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In the Supreme Court of the United States

OCTOBER TERM, 1973

HENRY L. TOMOW, SR., ET AL.,

Petitioners,

vs.

MENOMINEE ENTERPRISES, INC., ET AL.,

Respondents,

and

N. E. ISAACSON & ASSOCIATES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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In the Supreme Court of the United States

OCTOBER TERM, 1973

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HENRY L. TOMOW, SR., ET AL.,
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vs.

MENOMINEE ENTERPRISES, INC., ET AL.,
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and

N. E. ISAACSON & ASSOCIATES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

Petitioners, Henry L. Tomow, Sr., et al., pray that a writ of certiorari issue to review the final judgments of the Supreme Court of the State of Wisconsin, entered in this case on June 29, 1973, and August 14, 1973.

OPINIONS BELOW

The unreported opinion of the Trial Court appears post, pages 36-56, Appendix B. The opinion of the Supreme Court of the State of Wisconsin entered June 29, 1973, and reported at 60 Wis. 2d 1 (1973), 208 N.W. 2d 824, is reproduced post, pages 1-28, Appendix A. The

unreported opinion of the Supreme Court of the State of Wisconsin on petition for rehearing is reproduced post, page 29, Appendix A.

JURISDICTION

The opinions of the Supreme Court of the State of Wisconsin, were filed on June 29, 1973, and August 14, 1973. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Did the Wisconsin Supreme Court err by failing to apply the rule of liberal construction which must be applied to the federal government's dealings with the Indians, when it ruled that the Menominee Termination Plan did not reserve to tribal members the right to approve sales of tribal lands to non-Indians, contrary to the express intent of the tribe and the Secretary of the Interior when they approved the Plan pursuant to the mandate of 25 U.S.C. §896?

2. Did the Wisconsin Supreme Court err when it concluded that the tribe's approval of the Termination Plan met the requirements of 25 U.S.C. §893 respecting procedures to be followed in alienating individual tribal members' ownership interests in the tribal assets?

STATUTES INVOLVED

Menominee Termination Act of 1954 as amended P.L. 83-399 (68 Stat. 250) June 17, 1954, 25 U.S.C. §§893 and 896, as made effective by Proclamation of the Secretary of the Interior, April 29, 1961, 26 Fed. Reg. 3726.

STATEMENT OF THE CASE

Historical Background

Since time immemorial the Menominee Indians have lived as a tribe in eastern Wisconsin. In a series of seven treaties the Menominee ceded over 11 million acres of land to the United States and acknowledged themselves to be under the protection of the United States. Finally, in the 1854 Treaty of the Wolf River they received "a permanent home," composed of 276,480 acres "to be held as Indian lands are held," including the land which constitutes the subject matter of this controversy. After a cession of a portion of these lands in 1858 for the use of the Stockbridge-Munsee Indians, these lands were held intact by the United States government in trust for the tribe until April 30, 1961, when the Secretary of the Interior promulgated the Menominee Termination Plan, thereby making the Menominee Termination Act fully effective.[1]

The Process of Termination

In 1954, Congress enacted the Menominee Termination Act, 68 Stat. 250, 25 U.S.C. §§891-902, for the purpose of providing "for the orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin."[2] Section 893, 25 U.S.C., reproduced in Appendix E, post, provides that the beneficial ownership interest of individual Menominee

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[1] The facts, *supra*, are based on the opinion of the Court of Claims in *Menominee Tribe of Indians* v. *U.S.*, 177 Ct. Cl. 496 (1967), 391 U.S. 404 (1968).

[2] 25 U.S.C. §891.

Indians in the tribal assets were to become "personal property" as of the Secretary of the Interior's (Secretary) Proclamation of the closing of the final roll of the tribe, and that these interests would be manifested by a Certificate of Beneficial Interest which was to be issued by the tribe. It also provides that such interests would be alienable only in accordance with such regulations as might be adopted by the tribe. Section 896, 25 U.S.C., reproduced in Appendix E, post, required the tribe to develop a plan for the future control of tribal property which was to be approved and promulgated by the Secretary of the Interior, if it conformed to applicable federal law.

Until April 30, 1961, when removal of federal supervision was effectuated, tribal affairs were conducted by the General and Advisory Councils. General Council meetings were open to the entire tribe with all adult enrolled Menominee entitled to vote. The Advisory Council was an elected body that concerned itself primarily with business management of day-to-day affairs. Its action could be overturned by a vote of a General Council or by the Secretary of Interior.[3]

Pursuant to the mandate of 25 U.S.C. §896, the Menominee General Council in November, 1957, created a Coordinating and Negotiating Committee (C & N Committee) and authorized it to develop a Termination Plan such as was called for by the Termination Act itself.

In December, 1957, the Secretary published a Proclamation of Final Closure of the tribal rolls which included 3,270 names.[4] Effective upon this publication, the rights

[3] The facts in this and the following paragraphs are derived from the opinion of the Wisconsin Supreme Court, Appendix A, post, and the citations given.

[4] 22 Fed. Register 9957 (December 12, 1957)

or beneficial interest of each enrolled Menominee in the tribal assets became personal property, were to be evidenced by a Certificate of Beneficial Interest issued by the Tribe, and could be alienated only in accordance with such regulations as the tribe might adopt. 25 U.S.C. §893 [Appendix E, post].

The C & N Committee presented a proposed Termination Plan to the General Council on January 9, 1959. On January 9, 10, and 17, 1959, the tribal members considered the proposed plan for the future control of the tribal assets which consisted of Articles of Incorporation, By-Laws, Voting Trust Agreement, Minors Trust Agreement and Income Bond.[5] A resolution approving the proposed Termination Plan, as amended by those present, was passed January 17, 1959, by the General Council on a vote of 91-16. The Secretary of the Interior approved the Plan and published it in the Federal Register. The Plan published included a preamble and a Certificate of Beneficial Interest which were not part of the Plan approved by the General Council.[6]

Under the terms of the Plan and the Termination Act, a tribal corporation, Menominee Enterprises, Inc., (MEI), was to be formed to hold legal title to and manage the tribal assets, while members of the tribe listed in the final roll held the beneficial ownership interests in the tribal assets. Part of the Plan called for the creation of the "Menominee Common Stock and Voting Trust", com-

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[5] Minutes of the General Council, Record, pages 633-634.

[6] 26 Fed. Reg., pp. 3726-3755 (April 29, 1961), Compare Record pages cited in Footnote 5, *supra*.

posed of 7 persons, 4 Menominee and 3 non-Menominee. The Voting Trust was formed contemporaneously with the incorporation of MEI in 1961, shortly before Termination became effective, when upon disbursement of $327,000 of tribal funds held by the Secretary, the four members of the C & N Committee subscribed to a single stock certificate representing the 327,000 shares of stock in MEI. The Committee then signed a Voting Trust Agreement by which the single stock certificate was transferred to the voting trustees, who then issued voting trust certificates representing 100 shares of stock in MEI to each tribal member listed on the final roll, excepting minors and incompetents whose certificates, comprising 40% of the total, were turned over to the First Wisconsin Trust Company acting as trustee. The C & N Committee also contemporaneously cancelled the Certificate of Beneficial Interest which the Chairman of the Advisory Council had issued to the Committee.

Sale of Tribal Lands to Non-Menominees

During the General Council meetings in January, 1959, the question of sales of tribal lands to non-Menominee after Termination was discussed, and the tribe approved the language in Article XII of the MEI Articles of Incorporation to cover such a possibility.[7] On August 10, 1967,

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[7] Article XII reads:

ARTICLE XII—SALE OF LAND

Unless otherwise authorized by the affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote thereon, the corporation shall have no authority to sell, exchange, assign, convey or otherwise transfer all or any portion of the real property owned by the corporation; provided, however, that the board of directors, may mortgage or pledge corporation assets, for such borrowing purposes as it shall deem necessary and advisable, in an amount not exceeding $250,000; and, provided, further, that the board

the MEI Board of Directors, who are elected under the terms of the Plan by the voting trustees, and the trustees, jointly passed a resolution stating in part that MEI was authorized to sell Menominee Indian lands held by MEI pursuant to 25 U.S.C. §§ 896 and 897 and the Menominee Termination Plan to non-Menominee. See companion petition, *Daly* v. *DNR*. Pursuant to this resolution, MEI and N. E. Isaacson, a land developer and artificial lake builder, entered into an agreement whereby they established a joint venture to be known as "Lakes of the Menominees" (LOM). This agreement was given unanimous approval by the voting trustees and LOM undertook a substantial and extensive land and lake development project known as "Legend Lake". MEI received $150 per acre for the 5,170 acres it contributed to the LOM project. To date, approximately 2,000 recreational homesites in the project have been sold to non-Menominee purchasers. MEI's Board of Directors and Isaacson decided by agreement that Isaacson was to be the managing partner and that Isaacson's president and vice-president would have power of attorney to execute all deeds of conveyance from LOM to any purchaser in the ordinary course of business.

(footnote continued)

of directors or the appropriate officers at the direction of the board of directors shall have authority to lease real property other than lands designated as forest lands; and, provided, further, that the board of directors, or the appropriate officers at the direction of the board of directors, shall have authority to sell or to convey to individuals, who were enrolled tribal members under section 893, Title 25 U.S.C. (final roll) or their heirs-at-law, individual parcels which in the aggregate will not exceed 14,500 acres for home sites, agricultural use or other development, which lands shall be zoned for that purpose and shall not include lands designated as forest lands. 26 Fed. Reg. p. 3730 (April 29, 1961). (Emphasis supplied)

History of Litigation

The present action to stop sales of tribal land to non-Menominee was filed in the Circuit Court for Menominee County, Wisconsin, October 25, 1971, by 162 enrolled Menominee Tribal Members against MEI, the officers, directors, and voting trustees of MEI, and N. E. Isaacson & Associates, Inc., MEI's partner in the LOM development.

Petitioner's alleged basically that a part of the Menominee Termination Plan, Article XII of the MEI Articles of Incorporation,[8] required that sales of tribal lands to non-Menominee be approved by two-thirds of the tribal members, and that MEI had sold such land in the past, and was continuing to sell such land through the LOM joint venture without the approval of two-thirds of the tribal members so that such transfers are invalid. Petitioners also alleged in an alternative attack on the land sales that the voting trust had been invalidly established, and, hence, the voting trustees had improperly exercised the voting rights of the Menominee tribal members, and had authorized the sale of tribal land in violation of Article XII of the MEI Charter and petitioners' rights and, therefore, such sales of land were invalid.

The respondents basically admitted that such sales by MEI and Isaacson through the joint venture, LOM, were continuing; that Article XII merely required the approval of two-thirds of the voting trustees, and that although none of the petitioners had entered into a written voting trust agreement conferring upon the defendant

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[8] Article XII is reproduced at footnote 7, supra.

trustees the right to vote or otherwise represent shares in MEI, that the voting trust was set up pursuant to 26 U.S.C. 896 and the Menominee Termination Plan as published by the Secretary of the Interior and approved by the tribe.

The trial court noted that the case concerned a claim that Indian lands were wrongfully taken,[9] and after considering the Termination Act and Plan, and the circumstances surrounding the adoption of the Plan by the Tribe, it held that the intent of the tribe in approving the language of Article XII was to create a continuing restriction against the alienation of Indian lands to non-Menominees unless two-thirds of the tribal members approved such conveyances.[10] The trial court also ruled that the establishment of the voting trust did not violate state law requiring written agreement by shareholders depositing their interests in such a trust; or the terms of 25 U.S.C. §893, the provision in the Menominee Termination Act which granted tribal members personal property rights in the tribal property as of the closing of the final roll.[11]

Upon Isaacson's and various former MEI directors' and voting trustees' appeal from the trial court's decision, (MEI did not participate in the appeal), the Wisconsin Supreme Court rejected the broad standard of review which was adopted by the trial court. Basing its opinion solely upon the language of the voting trust

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[9] Appendix B, p. 49, post.

[10] Appendix B, p. 54, post.

[11] Appendix B, p. 46, post.

agreement which was a part of the Termination Plan, it found that such language clearly authorized the voting trustees to approve land sales to non-Menominees.[12] That court also held that the language of Article XII of the MEI Charter was inoperative while the voting trust was in existence.[13]

The Wisconsin Supreme Court also rejected petitioner's alternative argument that the creation of the voting trust failed to meet the requirements of state law, and 25 U.S.C. §§893 and 896, and, therefore, petitioner's 5th and 14th amendment rights to due process and equal protection of the laws were violated.[14]

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[12] Appendix A, p. 25, post.

[13] Appendix A, pp. 27-28, post.

[14] Appendix A, pp. 22-23, post.

REASONS WHY THE WRIT SHOULD BE GRANTED

A. THE WISCONSIN SUPREME COURT ERRED BY FAILING TO APPLY THE RULE OF LIBERAL CONSTRUCTION WHICH MUST BE APPLIED TO THE FEDERAL GOVERNMENT'S DEALINGS WITH THE INDIANS, WHEN IT RULED THAT THE MENOMINEE TERMINATION PLAN DID NOT RESERVE TO TRIBAL MEMBERS THE RIGHT TO APPROVE SALES OF TRIBAL LANDS TO NON-INDIANS, CONTRARY TO THE EXPRESS INTENT OF THE TRIBE AND THE SECRETARY WHEN THEY APPROVED THE PLAN PURSUANT TO THE MANDATE OF 25 U.S.C. § 896.

In 1968 this Court granted a Writ of Certiorari to determine whether certain hunting and fishing treaty rights reserved to the Menominee tribe by the 1854 Treaty of Wolf River had been abrogated by an Act of Congress, the Menominee Termination Act, 25 U.S.C. §891 et seq. This Court resolved a conflict between the Wisconsin Supreme Court, which had ruled that certain Indian rights were extinguished, and the United States Court of Claims which ruled that in the absence of specific congressional language, federal termination legislation did not abrogate the Menominee treaty rights. This Court affirmed the ruling of the United States Court of Claims. *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968).

Now, five years later, petitioners, individual Menominee Indians, have filed this petition to request this court to once again reverse a determination by the Wisconsin Supreme Court that certain unique Indian rights no longer survive Termination. Five years ago the Indian

treaty rights at issue dealt with hunting and fishing. Today the contested rights concern the Menominee tribal members continuing rights under the provisions of the 1854 Treaty of Wolf River and the Menominee Termination Act and Plan to control their tribal assets, in general, and the sale of their tribal lands to non-Menominees, in particular.

1. By enacting the Menominee Termination Act, Congress guaranteed tribal members the right to continue restrictions on alienation of tribal lands which the Menominee Tribe possessed by virtue of the 1854 Treaty of Wolf River.

The 1854 Treaty of Wolf River gave the land which is the subject of this dispute to the Menominee Tribe "for a home, to be held as Indian lands are held."[15] "Although the United States retained the fee, and the tribe's right of occupancy was incapable of alienation or of being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple absolute title."[16] The lands were held in trust for the tribe by the federal government until April 30, 1961, when the Secretary published the Termination Plan and the Menominee Termination Act thereby became effective. This Court in *Menominee Tribe of Indians* v. *U.S.*, 391 U.S. 404, 412 (1968), stated:

> The provision in the Menominee Termination Act (25 U.S.C. §899) that "all statutes of the United States which affect Indians because of their status

[15] See Record, p. 286.

[16] *U.S.* v. *Shoshone Tribe*, 304 U.S. 111, 117 (1938)

> as Indians shall no longer be applicable to the members of the tribe" plainly refers to the termination of federal supervision. The use of the word 'statutes' is potent evidence that no treaty was in mind.

Thus, the Menominees' treaty right to occupy and hold their treaty lands in common were not abrogated by the Termination Act. Congress did not allot the tribal lands, nor did it order the tribe to do so. In enacting the Menominee Termination Act, Congress recognized this treaty right by guaranteeing the Menominee tribal members the right to decide the future control of their tribal property:

> the tribe shall . . . formulate and submit to the Secretary a plan for the future control of the tribal property and service functions now conducted by or under supervision of the United States. . . . 25 U.S.C. §896.

In the Senate floor debates on H. R. 2828, which eventually became the Menominee Termination Act, Senator Watkins, the author of the Act, was asked what the bill provided with respect to the protection of the tribe's property after the Indians were put on their own. Senator Watkins responded:

> The bill provides that they can write into their own agreement, in whatever organization they set up, which will probably be a corporation, a restriction on alienation so that the property cannot be disposed of, or someone cannot take it away from them.

The debate continued:

> Sen. Chavez: That is the point I wanted to make because once in a while when we pretend to give the Indians a little freedom, all we do is open up opportunity for a land grab somewhere. . . .

> Sen. Watkins: It cannot happen to these Indians, because after all is said and done, the ultimate decision will be their own.[17]

This exchange is typical of the entire legislative history of the Termination Act, in that Congress was of the persuasion that the Menominee Tribe had advanced to a point where it was capable of controlling its own assets so that Federal supervision was no longer desirable. Thus, Congress mandated that the tribe itself formulate the plan for future control of the tribal assets, and, thereby, gave the tribe the right to continue restrictions on alienation of tribal lands if it so desired.

2. The trial court recognized petitioners' unique rights to protect their tribal lands from alienation after Termination, and held that the tribal members had explicitly reserved to themselves the right to approve land sales to non-Menominees in Article XII of the MEI Articles of Incorporation, and that such a reservation was approved by the Secretary of the Interior.

In deciding whether to admit evidence of the intent of the Menominee tribe when it approved the Termination Plan, the trial court characterized the case as involving one of the most important problems of Indian law, the illegal taking of Indian lands,[18] and concluded that:

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[17] 99 Cong. Record, p. 9746 (Aug. 24, 1953)

[18] "Underlying our discussions was an appreciation of the fact that American history is replete with instances where the Indians have claimed that land was wrongfully taken from them." [Appendix B, p. 49, post.]

> Ordinarily our law does not favor restrictions on alienation, and a proper construction of the trust agreement would probably place of the power of sale in the trustees. However, I consider that this is not an ordinary trust agreement but one that requires a consideration of the background and an interpretation of the plan against the proper setting. [Appendix B, pp. 49-50, post]

On the question of the intent to be found in the tribe's approval of the plan, the trial court started with the proposition that it was "basically the plan of the Menominee Indians," and that the Secretary approved the plan under the federal statute if it met certain conditions.[19]

After considering the minutes of the tribal meetings from the formation of the C & N Committee in 1957 through the approval of the Plan in 1959, and the language of the Articles of Incorporation and Voting Trust Agreement which were contained in the Termination Plan, the trial court concluded that by its approval of the Plan, the tribal members had reserved to themselves in the language of Article XII of the MEI Charter, the right to approve sales of tribal lands to non-Menominees:

> I found no discussion in any of the minutes as to whether the trustees would have the right to exercise the authority to sell contained in Article XII during the period that the shares were in trust. I do find contained in all these writings a strong, consistent opposition to the sale of any lands. . . . [Appendix B, p. 52, post]
>
> It seems improbable to me that from all of the evidence that one could conclude that the Menominees ever intended that the trustees should exercise the

[19] Appendix B, p. 50, post.

> power of sale of lands as an ordinary business operation. It is in my opinion out of harmony and out of character with all of the expressed sentiments contained in the tribal minutes. . . .
>
> I am most impressed by the deliberate selection of a very difficult and involved machinery to authorize the sale of land. Acquiring the consent of two-thirds of all the shareholders is so different from the simple matter of securing the approval of the trustees whether it is unanimous, two-thirds or a simple majority. It also appears to me to involve a kind and a quality of consent by the Menominee people which cannot be supplied by a few persons sitting as trustees no matter how conscientious and concerned they are for the well-being of the beneficiaries for whom they are acting. [Appendix B, pp. 54-55, post]

3. The Wisconsin Supreme Court ignored petitioners' rights under the Treaty of Wolf River, and the Termination Act and Plan, and narrowly construed a portion of the Termination Plan to abrogate the rights to control alienation of tribal lands which the trial court found that the petitioners had explicitly reserved to themselves in Article XII of the MEI Charter.

The Wisconsin Supreme Court recognized that the controversy as to land sales revolved around this language in Article XII:

> ARTICLE XII—SALE OF LAND
>
> Unless otherwise authorized by the affirmative vote of the *holders of not less than two-thirds of the outstanding shares of stock entitled to vote thereon*, the corporation shall have no authority to sell, exchange, assign, convey or otherwise transfer all or any portion of the real property owned by the corporation: . . . (Emphasis supplied)

and that "Art. XII which along with the voting trust formed the very heart of the Termination Act itself . . ."[20] However, without citing any support for its position, that Court held the language of Article XII inoperative during the life of the voting trust,[21] thus wiping out in one sentence the rights which Petitioners had thought they had assured themselves when they approved the language of Article XII. The Wisconsin Supreme Court then redefined the land sales issue as: "whether the voting trust agreement clearly grants authority to the trustees to sell land to non-Menominees."[22] Relying exclusively on the language of the voting trust agreement which did not mention land sales in any context, it held that the general language therein giving the trustees the power to vote the stock they held for every purpose, was a clear and specific grant of authority to the trustees to sell land to non-Menominees.[23]

The Wisconsin Supreme Court, thus, considered only a small part of the Menominee Termination Plan, which did not address the issue of land sales, and held the portion which did inoperative, without citing any support, in concluding that a seven member voting trust had the power to sell any amount of tribal lands to non-Menominees. Although the Wisconsin Supreme Court had before it the trial court's and petitioner's characterization of the case as a unique one involving Indian lands, and hence, in view

[20] Appendix A, p. 23, post.

[21] Appendix A, p. 27, post.

[22] Appendix A, p. 25, post.

[23] Appendix A, pp. 25-26, post.

of the language of Article XII, it was necessary to look to all the pertinent documents and circumstances surrounding the tribe's approval of the Plan in order to ascertain the intent of the tribe on this question, that Court refused to consider the intent of the tribe when it approved the language of Article XII concerning sale of tribal lands.

4. The Wisconsin Supreme Court's method of review flies in the face of this Court's consistent standards of reviewing dealings of the government with the Indians.

The Court of Claims in *Menominee Tribe of Indians* v. *U.S.*,[24] in holding that Menominee hunting and fishing treaty rights survived Termination, noted that the Wisconsin Supreme Court had based its previous decision in that case "solely on its interpretation of the words and language of the Act itself," and that had the Wisconsin Supreme Court:

> had the benefit of all the facts and circumstances surrounding the contemporaneous consideration of Public Law 280, . . . including the plan of the tribe incorporating a portion of Public Law 280 therein, and its approval by the Secretary of the Interior, in effect making such provisions of Public Law 280 a part of the Termination Act, the decision of that court might well have been different.

In the instant case, the Wisconsin Supreme Court *did* have, by virtue of the trial court's opinion and petitioners' arguments, the benefit of all the facts and circumstances surrounding the adoption of a Termination Plan which led

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[24] 179 Ct. Cl. 496, 510 (1967), 394 U.S. 404 (1968).

the trial court to hold that the tribal members had unquestionably reserved the right to themselves to approve sales of tribal land to non-Menominee.

Yet it still chose to rely exclusively on one small portion of the Plan in reaching its decision.

The fact that 25 U.S.C. §896 required the Secretary to approve the Plan and that such approval was necessary in order to effectuate the Act, makes the provisions of the plan a part of the Termination Act. [25]

In examining the Government's dealings with the Indians, this Court has consistently and without exception applied a liberal rule of construction under which doubtful expressions are to be resolved in favor of the Indians. See *Choate* v. *Trapp*, 224 U.S. 665, 675; *U.S.* v. *Shoshone Tribe*, 304 U.S. 111, 117; *Choctaw Nation* v. *U.S.*, 318 U.S. 423, 432; and *Winters* v. *U.S.*, 207 U.S. 564, 576. Such dealings have also been continuously construed by this Court in light of the historical circumstances under which they were executed and approved, with paramount emphasis being placed upon what was intended, understood and consented to by the Indians. See *Mattz* v. *Arnett*, ... U.S. ....., 37 L. Ed. 2d 92, 101; *Squire* v. *Capoeman*, 351 U.S. 1, 9; *Tulee* v. *State of Washington*, 315 U.S. 681, 684; *Carpenter* v. *Shaw*, 280 U.S. 363, 367; *Marlin* v. *Lewallen*, 276 U.S. 58, 64-65; *U.S.* v. *Payne*, 264 U.S. 446, 448-9; *Winters* v. *U.S.*, 207 U.S. 564, 576-577; and *Cherokee Intermarriage Cases*, 203 U.S. 76, 94-95. Reference to tribal meeting minutes to ascertain tribal intent has also occurred. See *Tulee* v. *State of Washington, supra.*

Further, this Court has often rejected arguments in such cases which were based on literal or technical interpreta-

[25] See quotation from Court of Claims, supra.

tions of pertinent documents, see *Marlin* v. *Lewallen, supra,* p. 65; *U.S.* v. *Payne, supra,* p. 449; *Winters* v. *U.S. supra,* p. 577, and *Cherokee Intermarriage Cases, supra,* p. 95.

The language in *Winters* v. *U.S., supra,* is particularly appropriate here. In deciding whether the Indians there had given up certain water rights, this Court stated that the liberal rule of construction:

> Should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it. On account of their relations to the Government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the Government, even if it could be supposed that they had the intelligence to foresee the "double sense" which might sometimes be urged against them. [267 U.S. 564, 577].

In the present setting, these canons of construction require a determination that the tribal members expressly reserved to themselves in the language of Article XII of MEI's Charter the right to approve land sales to non-Menominees. The Wisconsin Supreme Court's refusal to look at the intent of the tribe at the time it approved the Plan has resulted in a decision based upon a technical, legalistic construction of but a small portion of the Termination Plan which did not mention land sales, to the exclusion of a portion of the Plan specifically relating to such sales. For the above reasons, the Wisconsin Supreme Court's decision in regard to sales of tribal lands is totally unacceptable and must be reversed else the petitioners continuing treaty rights and the Congressional intent behind 25 U.S.C. §896 are unlawfully denied.

5. The Secretary of the Interior's approval and promulgation of the Menominee Termination Plan should be construed to have incorporated tribal and congressional intent respecting the restrictions on the alienation of tribal lands.

When the Secretary of the Interior published the approved Menominee Termination Plan, he was subject to unique limitations upon his administrative discretion existing in the field of Indian affairs:

> . . . the principles applicable to an "ordinary fiduciary" add little to the settled doctrine that the United States, as regards its dealings with the property of the Indians, is a trustee. In *Seminole Nation* v. *U.S.*, 316 U.S. 286, Mr. Justice Murphy, speaking for the Supreme Court said * * * this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. *Menominee Tribe of Indians*, 101 Ct. Cl. 10, 19 (1944).

Moreover, the Secretary was under a special statutory mandate, 25 U.S.C. §896, to assist the tribe in formulating a termination plan which conformed to applicable federal law. But the Wisconsin Supreme Court, by refusing to view the Termination Plan as a cohesive document and in light of the circumstances surrounding its approval by the tribe and the Secretary, has not only ignored Menominee treaty and statutory rights, and the expressed understanding of the Menominee people; but has also imposed a state law construction on the Menominee Termination Plan which raises serious questions as to the legality of the Secretary's role in approving the Plan.

B. THE WISCONSIN SUPREME COURT'S HOLDINGS ON THE TRANSFER OF TRIBAL MEMBERS BENEFICIAL OWNERSHIP INTERESTS TO THE VOTING TRUSTEES AS PROVIDED FOR IN § 893, CONSTITUTES A DENIAL OF THE RIGHTS WHICH WERE GUARANTEED TO PETITIONERS BY THAT SECTION OF THE TERMINATION ACT.

Section 893, 25 U.S.C., of the Menominee Termination Act stated that upon the Secretary's Proclamation of Final Closure of the roll of the tribe,

> "the rights or beneficial interests of each person whose name appears on the roll shall constitute personal property and shall be evidenced by a certificate of beneficial interest which shall be issued by the tribe . . . Such interests shall be alienable only in accordance with such regulations as may be adopted by the tribe." [Appendix E, post]

The Secretary's proclamation was published December 12, 1957 at pp. 9951-9972 of the Federal Register. The language of Section 893 on its face constitutes a unique arrangement concerning the beneficial ownership rights of individual tribal members in the tribal assets. The in-common ownership rights which each tribal member held before the Secretary's Proclamation, became divisible personal property rights upon that Proclamation in 1957, and yet the tribe still retained the right to issue the Certificate of Beneficial Interest which manifested those rights, and also to adopt regulations controlling the alienation of the rights. Thus, both the individual tribal members and the tribe derived certain rights to the beneficial ownership interests in the tribal assets under §893.

It is petitioners' position that the Wisconsin Supreme Court's holding that the tribe's approval of the concept of a voting trust was adequate to convey all the shares that the tribal members were entitled to receive by virtue of the language of §893, 25 U.S.C., is a clear violation of the personal property rights bestowed upon the petitioners by the language of 25 U.S.C. §893. Further, the Wisconsin Supreme Court's holding that the issuance of the Certificate of Beneficial Interest by the chairman of the advisory council and its transfer to the C & N Committee was valid in that the tribe adopted the Plan calling for the transfer of tribal assets to the tribal corporation and voting trust, ignores the fact that the Certificate of Beneficial Interest which manifested these interests, was not included in the Plan which was approved by the Tribe.[26] Therefore, any language contained in the Certificate purporting to give authority to the chairman of the advisory council or the C & N Committee to issue and alienate the rights evidenced in the Certificate is invalid. The Wisconsin Supreme Court's reliance on the fact that the chairman of the advisory council, who issued the Certificate, was the highest elected official of the tribe is contrary to its own recognition that the advisory council could only handle day-to-day matters.[27] The issuance of the Certificate evidencing all the beneficial ownership interests in tribal assets is hardly a routine matter. Finally, the C & N Committee was only given the authority by the general council to formulate a

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[26] See Record, pages 633-4.

[27] Appendix, A, p. 2, post

Termination Plan,[28] not to alienate the beneficial ownership interests of the tribal members to a voting trust.

What is at stake in this issue is control of the tribal assets after termination. The Wisconsin Supreme Court refused to consider the minutes of the general council meetings during which the Plan and the role of the voting trustees were discussed. That Court's reliance on the Secretary's approval of a "reasonable" Plan to establish the Plan's validity, cannot justify its refusal to examine tribal intent at the time the tribe approved the Plan, nor its blatant disregard of the discrepancy between the facts as stated in its opinion and the fact that the procedure which was followed in alienating the beneficial interests to the voting trust did not meet the clear language of 25 U.S.C. §893. And, again, in view of the Wisconsin Supreme Court's decision, serious questions are raised as to the exercise by the Secretary of his general trusteeship duties to the tribe and the special duty he had under 25 U.S.C. §896 to approve a Plan only if it conformed to federal law.

C. EFFECT OF THE WISCONSIN SUPREME COURT'S DECISION ON THE MENOMINEE AND OTHER TRIBES.

If the narrow, technical standard of review which was utilized by the Wisconsin Supreme Court in the instant case is allowed to stand unchanged, other state courts might be encouraged to abrogate or deny Indian rights secured by federal legislative or administrative actions when questions as to their construction are raised in state courts. This case concerns two of the most basic issues which concern Indian tribes; sale of tribal lands and control of tribal

[28] Appendix A. p. 3, post.

assets. In the instant case, the sale of over 2,000 lots to non-Menominee purchasers has already resulted in the destruction of valuable hunting and fishing grounds by flooding and subdivision, (see the petition in the companion case, *Daly* v. *DNR*), and a present and potential influx of thousands of permanent non-Indian residents who represent an extremely serious threat to the survival of Menominee culture and continued local political control by the approximately 2,500 Menominee residents of Menominee County, Wisconsin. There is no question but that irreparable harm has been caused by the sale of Menominee lands since 1961, but past sales are no excuse to allow more unlawful sales to be made.

This Court has often granted certiorari in cases where state courts had interpreted and applied federal law involving Indian tribes in conflict with applicable decisions of this Court. See *Mattz* v. *Arnett*, ... U.S. ....., 37 L. Ed. 2d 92, 95; *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 368, 368; *Seymour* v. *Superintendent*, 368 U.S. 351, 353-4; and *Williams* v. *Lee*, 358 U.S. 217, 218. And in *Affiliated Ute Citizens* v. *U.S.*, this Court granted certiorari "because of the importance of the issues for Indians whose federal supervision is in the course of termination." 406 U.S. 128, 141. In the recent *Mattz* and *Affiliated Ute Citizens* cases, supra, this Court recognized that the congressional philosophy and purpose, as well as the historical background of legislation affecting the Indians in those cases was to be considered in resolving the issues raised there. See *Mattz* at 37 L. Ed. 2d 92, 101 and *AUC* at 406 U.S. 128, 151. Petitioners here submit that the Wisconsin Supreme Court's failure to so consider the important claims which this case presents, has irreparably damaged the Menominee tribal assets and culture and, therefore, cannot be allowed to stand.

CONCLUSION

Petitioners respectfully request the Court to grant certiorari in that this case presents important federal issues relating to all Indian tribes and the Menominee tribe in particular, which have never been decided by this Court. Petitioners also believe that the Wisconsin Supreme Court has clearly decided the issues in a way which violates the Menominee Indian Tribe's rights under federal treaty and statutes, and contrary to the manner in which the issues similar to those raised here are decided by federal courts and this Court.

Respectfully submitted,

JOSEPH F. PRELOZNIK
MARY VAN GEMERT
Counsel for Petitioners

APPENDIX

APPENDIX

APPENDIX A

SUPREME COURT OF WISCONSIN

Tomow and others, Plaintiffs and Respondents v. N. E. Isaacson & Associates, Inc., Defendant and Appellant: Menominee Enterprises, Inc., and others, Defendants and Respondents.

No. 508. Argued June 4, 1973.—Decided June 29, 1973.

Appeal from parts of a judgment of the circuit court for Menominee county: William J. Duffy, Circuit Judge of the Fourteenth Circuit. Presiding. *Affirmed in part; reversed in part.*

Action by Henry L. Tomow, Sr., and 161 other members of the Menominee Indian Tribe who are or were at all times material, registered shareholders and/or holders of voting trust certificates of Menominee Enterprises, Inc. (hereinafter "plaintiffs"), on behalf of themselves and all other shareholders simialrly situated; against Menominee Enterprises, Inc. (hereinafter "MEI"); the officers and directors of "MEI"; the trustees of the Menominee common stock and voting trust (hereinafter "voting trust"); and N. E. Isaacson & Associates, Inc. (hereinafter "Isaacson") who, together with "MEI," entered into a partnership known as "Lake of the Menominees," (hereinafter "LOM") challenging the validity of the "voting trust," the power of the trustees of the "voting trust" to authorize the sale of land to non-Menominees and the validity of certain land transfers made to "LOM."

The facts upon which the present action is based are, for the most part, without dispute and the result of a stipulation between the parties.

The Menominee Indian Tribe was well established in Wisconsin two hundred years before the European settlers began their westward movement across the United States. Except for a small cession of land for the Stockbridge-Munsee Reservation, the last of a series of treaties between the United States government and the Menominee Tribe was the "Treaty of Wolf River" of 1854. Pursuant to the treaty, the Menominees ceded land to the United States and the United States agreed to give to the Indians land of which the present Menominee county was the largest part.

Traditionally, all tribal affairs were handled by the tribe in general councils and by the advisory council. The general councils were meetings open to the entire tribe at which all adult enrolled Menominees could vote. The advisory council, created in 1928, was an elected body that concerned itself primarily with business management of day-to-day affairs. Its action could be overturned by a vote of a general council or by the secretary of the interior.

In 1953, Congress, by concurrent resolution, instructed the secretary of the interior to recommend legislation for the withdrawal of federal supervision over the Menominees as well as several other named tribes and in 1954, Congress passed the "Termination Act."[1] After publication of the secretary of interior's proclamation in the Federal Register,[2] termination became effective midnight,

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[1] 68 U.S. Stat. at L., p. 250, as amended, 70 U.S. Stat. at L., p. 549, 72 U.S. Stat. at L., p. 290, 74 U.S. Stat. at L., p. 867; 25 USC, secs. 891-902.

[2] 26 Fed. Reg., No. 82, April 29, 1961, at page 3726.

April 30, 1961. The proclamation provided for the transfer of the tribe's property which was held in trust by the federal government and the end of any supervision and control by it over the Menominees and the Menominee Reservation.

In November, 1957, a general council of the tribe created the "Menominee Co-ordinating and Negotiating Committee" (hereinafter "C. N. Committee"). The function of the four-member committee was to develop a termination plan such as was called for by the "Termination Act" itself.[3] Authority for the preparation of the termination plan came from the general council which created it under the advisory council.

In December of 1957, the final rolls of membership in the Menominee Tribe were closed and the membership list of 3,270 persons was published in the Federal Register. A "Termination Plan" was proposed to a general council in a series of three meetings in January of 1959 and as amended by those present, it was approved by a 91 to 16 vote on January 17, 1959. It was also approved by the secretary of the interior.

Part of the plan called for the creation of the "Menominee common stock and voting trust." Individual members of the Menominee Tribe did not enter into written agreements creating the voting trust and consequently, whatever legal assent which exists on the part of the Menominees to the establishment of the voting trust emanates from the votes of the general council. At all times material to this action, there were seven trustees of the voting trust: four enrolled members of the Menominee Tribe elected by the general council and three nontribal members elected joint-

[3] 25 USC, 896.

ly by the advisory council and C. N. Committee, subject to confirmation by the general council. The affirmative vote of five trustees is needed to take any action. Under the provisions of the "Termination Plan" the selection of the trustees occurred in advance of the termination date and before any trust in fact existed. While the voting trust is in existence, it may be terminated by the tribal members who become holders of the voting trust certificates in ten, twenty or thirty years. Under the original plan, the certificates could not be sold or negotiated before January 1, 1971, with "MEI" having the option to purchase the certificates at the proposed sales price, and, in the absence of the exercise of the option, the state of Wisconsin has the same right. In May of 1969, the certificate holders were given the opportunity to extend the January, 1971, deadline until January 1, 1974, and approximately 51.2 percent of the certificate holders voted for the extension.

Contemporaneously, with the selection of the initial trustees, the plan also called for the creation of a corporation under Wisconsin law to be known as Menominee Enterprises, Inc. ("MEI") The members of the C. N. Committe, as individuals, signed as incorporators of "MEI." Under the provisions of the plan, the voting trustees, prior to the organization meeting of the corporation, will informally name the individual directors of "MEI" and those persons will be named in the articles of incorporation and will formally be elected by the subscribers of all of the stock—the C. N. Committee—at the organization meeting.

The principal purpose of "MEI" is to manage and operate all of the business and property, real and personal, transferred to the corporation by the United States of America, pursuant to 25 USC, 897. Although "MEI" owns

and operates a sawmill and smaller, related businesses, its principal asset is land. By two deeds, both dated April 26, 1961, and recorded in the office of the register of deeds of Menominee county, Wisconsin, the United States conveyed to "MEI" all of the land which, for practical purposes, previously constituted the Menominee Indian Reservation and which presently constitutes Menominee county, Wisconsin. About one quarter of a million acres comprise Menominee county.

Under the articles of incorporation, "MEI" was granted the authority to issue shares of stock and the "MEI" directors accepted the subscription of the committee. The Secretary of the Interior then advanced $327,000 of the funds he was holding in trust and this money was used to pay for the stock. "MEI" issued a single stock certificate to the committee for 327,000 shares of stock. The C. N. Committee signed the voting trust agreement and named as trustees those individuals previously approved by a general council and transferred the stock "MEI" held in its name to the voting trust. The trustees then issued voting trust certificates to the enrolled Menominess as evidence of their interests in the stock the trustees held, with each certificate representing 100 shares of stock in "MEI." In the case of minors and incompetents, the certificates were turned over to the "Menominee assistance trust," a second trust provided by the plan with the First Wisconsin Trust Company acting as trustee.[4] It was stipulated that each

[4] The plan also provided that upon termination, $1,500 was to be distributed to each enrolled Menominee. After the other assets were transferred to "MEI", it issued a $3,000 income bond to each individual Menominee. The bond is payable on December 1, 2000, and pays 4 percent interest or $120 per year.

step required to be taken under the "Termination Plan" for the organization and activation of "MEI" and the voting trust were in fact taken.

On August 10, 1967, the board of directors of "MEI" and the trustees of the voting trust jointly passed a resolution. Eight of nine directors and all of the then seven trustees unanimously adopted the following resolution:

"WHEREAS, there is no other means sufficiently capable of accomplishing the economic improvement of the Menominee community except by adoption and implementation of the ERNST & ERNST REPORT; and

"WHEREAS, to provide necessary tax resources for Menominee County and/or the Town of Menominee and for the relief of taxation on Menominee Enterprises, Inc. (and the residents of Menominee County, Wisconsin), and to assure continued Menominee ownership thereof:

"I. BE IT RESOLVED, that Menominee Enterprises, Inc. is authorized to proceed with the recommendations of the Ernst & Ernst Report as opportunity and feasibility permit; and

"II. RESOLVED FURTHER, that the Corporation is authorized to *define economic development zones on its land in Menominee County,* Wisconsin, not to exceed 8,750 acres in areas to be defined and described from time to time by the Menominee Common Stock & Voting Trust, and/or the shareholders of the Corporation, whichever then holds the common stock; and

"III. RESOLVED FURTHER, that *pursuant to Article XII of the Articles of Incorporation of Menominee Enterprises, Inc.* within such economic development zones *warranty deeds may issue as a form of land transfer, pro-*

vided a sufficient form of quality control is a condition of such transfer, and provided always that sufficient areas of land on lakeshore be reserved for Menominee use." (Emphasis added.)

The "Ernst & Ernst Report"[5] referred to in the resolution was a technical assistance study of Menominee county by the Economic Development Administration which recommended that in order for the county to achieve economic self-sufficiency, the county's recreational resources be developed by the creation of several large lakes from smaller ones and the development of the cottage sites around them. The "Termination Plan" itself had stated only that the area had excellent commercial recreational possibilities, the development of which was being considered.

Art. XII of the articles of incorporation of "MEI" referred to in the resolution contains the following provision governing the sale of land by the corporation:

> *"Unless otherwise authorized by the affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote thereon, the corporation shall have no authority to sell, exchange, assign, convey or otherwise transfer all or any portion of the real property owned by the corporation; . . .* provided, further, that the board of directors, or the appropriate officers at the direction of the board of directors, shall have authority to sell or to convey to individuals, who were enrolled tribal members under section 893, Title 25, U.S.C. (final roll) or their heirs-at-law, individual parcels which in the aggregate will not exceed 14,500 acres for home sites, agricultural use, or other development, . . ." (Emphasis added.)

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[5] Ernst & Ernst, *Technical Assistance Study of the Potential for Tourism and Industrial Development in Menominee County, Wisconsin,* C-164-66 (NEG) Economic Development Administration, U.S. Department of Commerce, March, 1967.

On September 13, 1967, a referendum was held in which all Menominees who held certificates (except minors and incompetents whose interests were voted by their special trustee, First Wisconsin Trust Company) were invited to express their opinion on the resolution of August 10, 1967. Of a total of 109,125 votes cast, 97,738 were for and 11,387 were against the resolution. Among the "yes" votes were 79,362 votes cast by First Wisconsin Trust Company. The referendum was announced as "advisory" and the written material distributed referred to the use of warranty deeds.

On July 9, 1968, "MEI" and N. E. Isaacson entered into an agreement whereby they established a joint venture to be known as "Lake of the Menominees" ("LOM") which was, however, to be governed by the Wisconsin Uniform Partnership Act. By the terms of the agreement of July 9, 1968, the partnership was entered into for the purpose of holding, developing and selling to persons including non-Menominees certain lands consisting of 5,170 acres located within the economic development zone referred to in the joint resolution of August 10, 1967.

The agreement of July 9, 1968, was contingent upon approval by the trustees which was given unanimously by them in July of 1968. "LOM" undertook a substantial and extensive land and lake development project known as "Legend Lake" and among other things, approximately 2,000 recreational homesites out of 2,600 such sites have been sold and water-level control dams and roads have been constructed. Subsequently, between the dates of September 12, 1968, and April 5, 1971, the approximately 5,170 acres referred to in the partnership agreement of July 9, 1968, were conveyed by "MEI" to "LOM" partnership by means of seven warranty deeds, all of which were executed

and recorded in the office of the register of deeds of Menominee county, Wisconsin prior to the commencement of the present action. Of the 5,170 acres conveyed, 1,333 acres valued at $150 per acre, represented "MEI's" initial contribution to the "LOM" joint venture. By the agreement, "MEI" gave to "LOM" the option to purchase an additional 3,837 acres also at $150 per acre.

On September 30, 1968, "MEI" and Isaacson by written agreement decided that Isaacson was to be the "managing partner" of "LOM" and to facilitate the management, development and sales of land that N. E. Isaacson, as president of Isaacson, and Ralph Voss, as vice president and assistant secretary, would have power of attorney to execute all deeds of conveyance from "LOM" to any purchaser in the ordinary course of business.

The agreement of July 9th was performed to a substantial degree and in 1969, Isaacson and "MEI" agreed to increase the number of lots to be developed and sold from 1,800 to 2,600, all of them to be laid out on the land conveyed by the seven warranty deeds. On or about March 11, 1969, "LOM" applied for a permit to construct a third dam in the Legend Lake Project. On October 15, 1971, Isaacson asked "MEI" if it would agree to try to sell out the project in 1972 and to incur additional selling costs beyond the agreement ceiling of 30 percent. A motion (of the "MEI" Board) was passed to refer the matter to "LOM" Management Committee to act within its discretion.

The present action was filed in the circuit court for Menominee county, Wisconsin on October 25, 1971, and a lis pendens containing the names of the parties, the object of the action, and a description of the land involved in the

action was filed with the office of the register of deeds in Menominee county on the same day. The first count of plaintiffs' complaint alleges that neither they nor any other "MEI" shareholder ever entered into a written voting trust agreement creating a voting trust for the purpose of conferring upon defendant trustees or any other trustees the right to vote or otherwise represent their shares in "MEI." It goes on to allege that the defendant trustees of the voting trust are and have been unlawfully exercising the voting rights of plaintiffs and other shareholders in that they have elected the defendant directors of "MEI" and excepting trustees Ignace and Deer, they have participated in, approved and/or ratified a decision of the defendant directors to sell "MEI" land to nonenrolled Menominee tribal members in violation of the articles of incorporation and in usurpation of plaintiff's rights. Likewise, they contend that pursuant to the trustees' approval, the officers and directors of "MEI" entered into an agreement with defendant Isaacson purporting to bind "MEI" to a joint venture involving the sale of land to non-Indians.

Plaintiffs' complaint as a second count, alleges that with the exception of certain limited sales of real property to enrolled tribal members, "MEI's" articles of incorporation specifically bars the sale of corporation real property unless it is authorized by the affirmative vote of the holders of not less than two thirds of the outstanding shares of stock entitled to vote thereon, and in spite of the fact that no sale of "MEI" real property has ever been authorized by the holders of not less than two thirds of the outstanding shares of stock entitled to vote thereon, the officers and directors of "MEI" have purported to sell corporate real property through the "LOM" joint venture.

Pursuant to their first count, relating to the validity of the "Voting Trust," plaintiffs demanded judgment declaring the "voting trust" null and void; an order permanently enjoining the "MEI" directors from attempting to exercise in any way the rights of the plaintiffs, a determination that the joint venture agreement of July 9, 1968, between Isaacson and "MEI", except as to the rights of prior good faith purchasers, is null and void; that the declaration in the July 9th agreement given to N. E. Isaacson and Ralph Voss power of attorney to execute all deeds of conveyance from "LOM" to any purchaser is null and void; an order calling for the election of a new board of directors; and an order requiring defendants "MEI" and Isaacson to recovery to "MEI" all properties formally transferred to "LOM" which had not been conveyed to a good faith purchaser at the time the defendants learned of the lawsuit, or at the time of filing the action, whichever is earlier.

As judgment on the second count of their complaint, plaintiffs demanded that a special shareholders meeting be called for the purpose of electing new directors of "MEI"; that the "LOM" agreement be declared null and void; that the officers and directors of "MEI" be enjoined and restrained from honoring its contract with Isaacson in any way whatsoever; an order requiring the officers and directors of "MEI" to make an accounting and to pay into court all money and assets accounted for; and other relief concerning the liability of the officers and directors to "MEI" for all losses and damages occasioned by their acts.

On April 21, 1972, the plaintiffs, by stipulation and with court approval, filed a supplemental complaint which added certain defendants because of their election as trus-

tees of the "voting trust" or directors of "MEI." The supplemental complaint also alleged that the joint venture agreement dissolved December 31, 1971, unless extended; that Isaacson and "MEI" did not extend it; that another agreement for the sale of land to non-Menominees would require authorization by the holders of at least two thirds of the outstanding shares entitled to vote or that is to say, enrolled Menominees.

They also allege that since termination of the agreement, neither two thirds of the enrolled Menominees nor two thirds of the trustees have authorized new sales to non-menominees and that at the present time, "LOM" could not obtain a two-thirds vote of authorization from the trustees, as evidenced by the affidavits by six of the eleven trustees, stating that they were opposed to land sales to non-Menominees and would vote against such sales were a vote taken; and that in spite of this, "MEI" and Isaacson are and threaten to continue to sell land to non-Menominees.

The action came to trial before the court, without a jury, on May 8, 1972. In its written decision of July 24, 1972, the trial court found that although the "voting trust" was not invalid, art. XII of the articles of incorporation of "MEI" relating to the sale of land by the corporation was ambiguous and consequently heard extrinsic evidence concerning the basic intent of the parties in the adoption of art. XII. After a review of the evidence upon which it relied, the court concluded that the reference to "two thirds of the outstanding shares of stock entitled to vote thereon . . ." referred to two thirds of the enrolled Menominees and not to a two-thirds vote of the trustees. The court then granted an injunction against any further sales of land with the

understanding that jurisdiction would be retained to consider evidence in support of other remedies at a later date.

Subsequent to the July 24th decision, the defendants, by orders to show cause, brought motions seeking to clarify and limit the earlier injunction. The parties agreed at the time of the hearing on these motions that there were 121 sales of lots, estimated at approximately $900,000 in which offers of purchase had been accepted, but the delivery of deeds and formal closing had not yet occurred. In six of these sales, the offer and acceptance had occurred prior to October 24, 1971, the date of filing of the lis pendens.

Isaacson contended that the conveyance of the seven warranty deeds were executed conveyances, and even though made in an irregular manner under the court's earlier ruling, they should not be impeached or disturbed because of any irregularity in the exercise of the unquestioned corporate power. Although it recognized the rule of law relied on, the circuit court, nevertheless, concluded that the transfer of 5,170 acres of land by seven deeds by "MEI" to "LOM," all occurring prior to the filing of the lis pendens, were not entitled to the status of completed or executed transactions.

From those parts of the court's interlocutory judgment that held "Article XII of MEI's" articles of incorporation ambiguous; that held the seven conveyances from "MEI" to "LOM" prior to the commencement of the action to be without necessary stockholder approval and, therefore, an improper exercise of the corporation's power to convey land; that held sales made subsequent to the commencement of the action were subject to the continuing jurisdiction of the court because the seven conveyances from "MEI" to "LOM" were not executed corporate transactions; and which enjoined the defendants from any

further sales of land to non-Menominees, Isaacson and the other named defendants have appealed. Defendant "MEI", however, is not participating in this appeal.

From that part of the interlocutory judgment holding the "voting trust" valid under Wisconsin law, the plaintiffs have appealed.

For the appellant there were briefs by *Welsh, Trowbridge, Planert & Schaefer* of Green Bay, and oral argument by *Vance M. Waggoner,* of Green Bay.

For the plaintiffs-respondents there was a brief by *Joseph F. Preloznik* and *Mary E. Van Gemert,* both of Madison, and oral argument by *Mr. Preloznik.*

For the defendants-respondents there were briefs by *Foley & Lardner* of Milwaukee, and oral argument by *Gilbert W. Church* of Milwaukee.

HANLEY, J. Three issues are presented on this appeal.

1. Did the trial court err in holding that the Menominee common stock and voting trust was not invalid because it was contrary to controlling federal and state law and the United States Constitution;

2. Did the trial court err in holding that art. XII of the articles of incorporation of "MEI" was ambiguous and, therefore, a proper matter for judicial construction; and

3. Did the trial court err in holding that the unsold land which was conveyed by "MEI" to "LOM" without the approval of the individual tribal members was subject to plaintiffs' lis pendens and an injunction prohibiting its sale?

Validity of voting trust.

The "Termination Act" which mandated the complete withdrawal of federal supervision and control over the

Menominee Tribe called for the formulation of a plan for the future control of tribal property and service functions by the tribe itself. 25 USC, 896 of the federal statute provided that the plan, when completed, was to be submitted to the secretary of the interior who ". . . *shall accept such tribal plan* as the basis for the conveyance of the tribal property *if he finds that* it will treat with reasonable equity all members on the final roll of the tribe prepared pursuant to Section 893 of this title, and that it conforms to applicable Federal and State law." (Emphasis added.)

Contrary to the contentions of the plaintiffs who are as to this issue appellants on appeal, both the secretary of the interior and the trial court were satisfied that the mandate of 25 USC, 896 was complied with. After a review of the various arguments which the plaintiffs have raised, this court reaches the same conclusion.

The plaintiffs' first contention in support of their conclusion that the voting trust here involved is invalid is that Wisconsin's voting trust statute, sec. 180.27, Stats., was not complied with. Sec. 180.27, was originally enacted by sec. 7 of ch. 731, Laws of 1951, and now provides:

> "*Voting trusts and agreements among shareholders.*
>
> (1) Any number of shareholders of a corporation may create a voting trust for the purpose of conferring upon a trustee or trustees the right to vote or otherwise represent their shares by entering into a written voting trust agreement specifying the terms and conditions of the voting trust, by depositing a counterpart of the agreement with the corporation at its registered office and by transferring their shares to such trustee or trustees for the purposes of the agreement. Such trustee or trustees shall keep a record of the holders of voting trust certificates evidencing a beneficial interest in

the voting trust, giving the names and addresses of all such holders and the number and class of the shares in respect of which the voting trust certificates held by each are issued, and shall deposit a copy of such record with the corporation at its registered office. The counterpart of the voting trust agreement and the copy of such record so deposited with the corporation shall be subject to the same right of examination by a shareholder of the corporation, in person or by agent or attorney as are the books and records of the corporation, and shall be subject to examination by any holder of a beneficial interest in the voting trust, either in person or by agent or attorney, at any reasonable time for any proper purpose.

"(2) Agreements among shareholders regarding the voting of their shares shall not be subject to the provisions of this section regarding voting trusts."[7]

Under the above statutes, pursuant to an agreement, shareholders transfer their shares to the voting trustees which transfers are in turn recorded on the corporation's book, thereby making the trustee the record holders. During the period of the trust and pursuant to the trust agreement, the trustees vote the shares. In exchange for the shares, voting trust certificates which represent the equitable interest in the shares transferred, and any shares which might be awarded as dividends are issued by the trustees to the original shareholders.

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[7] The statute originally limited a voting trust to not more than twenty years; ten years longer than the Model Code. Even the twenty-year limitation was omitted by ch. 399 of the Laws of 1953. Such unlimited duration is not common to the statutes of most other states. *See* Henn, *Law of Corporations* (1970), p. 392, sec. 197. Sub. (2) of sec. 180.27, exempting shareholder agreements from the provisions of the voting trust statute, was created by sec. 15, ch. 285, Laws of 1971.

In material part, sec. 180.27, Stats., provides that "Any number of shareholders of a corporation may create a voting trust . . . by entering into a written voting trust agreement . . ." The thrust of the plaintiffs' argument is that the individual enrolled members and not the C. N. Committee whose members signed as incorporators of "MEI" and who also signed the voting trust agreement were the "shareholders" of the corporation for purposes of entering into the agreement.

Under the articles of incorporation, "MEI" was granted the authority to issue shares of stock and the "MEI" directors accepted the subscription of the C. N. Committee which was originally created by the general council to develop the Termination Plan. The secretary of the interior then advanced $327,000 of the funds he was holding in trust and this money was used to pay for the stock. "MEI" issued a single stock certificate to the committee for 327,000 shares of stock. The C. N. Committee signed the voting trust agreement and named as trustees those individuals previously approved by a general council and transferred the stock "MEI" held in their name to the voting trust. The trustees then issued voting trust certificates to the enrolled Menominees as evidence of their interests in the stock the trustees held, with each certificate representing 100 shares of stock in "MEI."

The defendants contend that the voting trust was formed in exact compliance with sec. 180.27, Stats. Shares in "MEI" were issued to members of the C. N. Committee who then transferred the stock to the trustees on the basis of a written instrument. The shareholders thus created the trust by "entering into a written voting trust

agreement" as required by statute. Likewise, this procedure conformed exactly to the provisions in the Termination Plan which was agreed upon by the Menominees.

Plaintiffs contend that the vote of the general council in January of 1959, which approved the Termination Plan—including the voting trust agreement—could not be a substitute for individual "shareholder" approval. This argument, together with the cases which are cited by the plaintiffs, are all predicated on the proposition that individual Menominees had been issued "shares" of stock in "MEI" prior to the formation of the trust.

While it is clear that 25 USC, 893, referring as it does to the "rights or beneficial interests" of each of the enrolled Menominees, "shall constitute personal property . . . evidenced by a certificate of beneficial interest which shall be issued by the tribe" gave to each enrolled Menominee at the very least an undivided one third 270th interest in the assets of "MEI," such an interest cannot be analogous to a "share of stock." Sec. 896 of Title 25, USC, relating to the Termination Plan which the tribe was to formulate, states that "[t]o the extent necessary, the plan shall provide for such terms of transfer pursuant to Section 897 of this title, by *trust or otherwise,* as shall insure the continued fulfillment of the plan." (Emphasis added.) Sec. 897 provides that "[o]n or before April 20, 1961, the Secretary [of the Interior] is authorized *to transfer to the tribal corporation or to a trustee* of the Secretary's choice . . . *the title to all property, real and personal, held in trust by the United States for the tribe.*" (Emphasis added.)

The two deeds by which the United States conveyed what now constitutes Menominee county were conveyed to "MEI", not to the individual enrolled Menominees.

Likewise, the Secretary of the Interior advanced the $327,000 of the funds held in trust, not to each enrolled Menominee, but rather to the committee who in turn used it to pay for the stock it had previously subscribed to. Prior to termination, individual enrolled Menominees never had certificates or control over their interests in tribal assets. Indeed, the assets were held in trust by the federal government and were subject to tribal and federal law and not corporate law as the plaintiffs contend.

While it is clear that the original draftees of sec. 180.27, Stats., never contemplated a factual situation like the one presented in this case, it likewise is manifestly clear that the procedures here employed did not run counter to the statute. The trial court agreed and stated:

> "I am impressed by the reasonableness of the method established in the plan contrasted with the unwieldy procedure of having the shares issued to the individual Menominees some of whom would be minors or incompetents and then placed in trust under procedural requirements of sections 180.27. It is obvious that a trust arrangement was considered in the best interests of the Menominees in accordance with their own plan. It seems to me the procedure adopted to accomplish this was eminently sensible."

Plaintiffs next contend that the certificate of beneficial interest representing tribal members' rights or beneficial interests in tribal property was issued, transferred and cancelled in violation of 25 USC, 893. Sec. 893 of Title 25, USC, after setting forth a very precise procedure for determining who will be considered an enrolled Menominee with the initial decisions by the tribe, followed by an appeal right to the Secretary of the Interior, provides:

> "When the Secretary has made decisions on all appeals, he shall issue and publish in the Federal Register a Proclamation of Final Closure of the roll of the tribe and the final roll of the members. Effective upon the date of such proclamation, the rights or beneficial interests of each person whose name appears on the roll shall constitute personal property and shall be evidenced by a certificate of beneficial interest which shall be issued by the tribe. Such interests shall be distributable in accordance with the laws of the State of Wisconsin. Such interests shall be alienable only in accordance with such regulations as may be adopted by the tribe."

The certificate itself was executed on June 17, 1964, by James G. Frechette, Chairman, Menominee Advisory Council, and begins as follows:

> "This is to certify that the persons whose names are listed in the schedule attached hereto, identified as 'Final Roll-Menominee Tribe of Indians of Wisconsin' (Vol. 22, FEDERAL REGISTER Number 240, pages 9951-9972, inclusive) are the holders (hereinafter sometimes called 'Tribal Members') of undivided equal shares in this Certificate of Beneficial Interest, which evidences the rights and interests of each such person and all of them and the personal representatives, heirs or next of kin of deceased Tribal Members (hereinafter sometimes called 'lawful distributees') to all property, real and personal, now or hereafter, legally or beneficially owned by the Menominee Indian Tribe of Wisconsin. This Certificate has been issued by said Tribe as of June 17, 1954, pursuant to the provisions of section 391, Title 25 U. S. C. and is the Certificate of Beneficial Interest therein described."

It goes on to provide that it is delivered to the C. N. Committee who shall hold it on behalf of the tribal members of their lawful distributees, "According to the terms

of the certificate." Thereafter, the C. N. Committee "on behalf of the tribal members will cancel the certificate in accord with the terms and provisions of the 'Plan. . .'" The provisions of the plan relating to the certificate provide that:

> "*Description of economic plan.* The economic plan, designed to promote the highest beneficial use of the communal property, is set forth in six basic documents: (1) Articles of Incorporation of Menominee Enterprises, Inc., (2) By-Laws of Menominee Enterprises, Inc., (3) a common stock and voting trust, (4) a bond indenture, (5) a Menominee Assistant trust, (6) a Certificate of Beneficial Interest.
>
> "One Certificate of Beneficial Interest in form attached will be issued pursuant to section 893 Title 25 U. S. C., with list attached thereto of the tribal roll of 3,270 members as of June 17, 1954 (as finally proclaimed.) The Certificate will be issued as of June 17, 1954, in advance of termination date, and will be held by the Coordinating and Negotiating Committee until that date. At that time, the Committee will mark it 'cancelled' and file it with its records.
>
> "It is a part of this Plan that (1) the issue of stock to the said Coordinating and Negotiating Committee, (2) the issue of voting trust certificates to tribal members and lawful distributees of deceased members upon deposit of the stock in the Common Stock and Voting Trust, (3) the issue of income bonds, (4) the transfer of real and personal property to the said Coordinating and Negotiating Committee and/or to Menominee Enterprise, Inc., or any subsidiary, (5) the transfer of real and personal property to any public body; shall all be in substitution for and consideration of cancellation of the Certificate of Beneficial Interest and no one shall thereafter have any rights or interest in such Certificate."

The plaintiffs contend that the chairman of the advisory council had no authority to issue the certificate since by express terms of 25 USC, 893 only the "tribe" could issue the certificate. Likewise, they contend that the chairman had no authority to authorize the C. N. Committee to cancel the certificate in accordance with the terms and provision of the Termination Plan. Assuming the chairman did have authority to issue the certificate, the plaintiffs contend the C. N. Committee did not have authority to cancel the certificate in exchange for "MEI" stock.

First of all, by its very terms, the primary purpose of the certificate of beneficial interest was to put the tribe on record as approving the final roll.

The certificate was signed by the chairman of the advisory council for the tribe because he was the highest elected official of the tribe. Furthermore, the transfer to the C. N. Committee of the certificate and its subsequent cancellation of the certificate were in strict compliance with both the terms of the certificate and with the federal statute. Sec. 893 provided that the interests represented by the certificate could be "alienable" only in accordance with regulations adopted by the tribe. The tribe did adopt the plan calling for the transfer of tribal assets to the tribal corporation and trust. The adoption of the plan "by the tribe" and its use as "the basis for the conveyance of the tribal property" were also authorized by the federal statute. (25 USC, 896, 897)

Plaintiffs' constitutional attack based on both the due process and equal protection clauses are also without merit. As stated before, the individual Menominees were not "shareholders" as that term is used in sec. 180.27,

Stats., and consequently plaintiffs' argument that no other "shareholders" of a Wisconsin corporation could be made to enter into a voting trust without their individual written approval must fail for that reason. Plaintiffs' argument that the procedures here employed deprived them of their personal property without due process of law totally disregards the facts that the Termination Plan was approved by the tribe.

We conclude that the trial court's interlocutory judgment herein, to the extent that it held the Menominee common stock and voting trust to be valid was correct.

Ambiguity of trust.

Defendants contend that the trial court erred in declaring art. XII of the articles of incorporation of "MEI" ambiguous and, therefore, subject to judicial construction by resort to extrinsic evidence. The plaintiffs who, as to this issue, are respondents, support the determination of the trial court. All parties are in agreement that extrinsic evidence bearing on the intent of art. XII may only be resorted to once an instrument has been declared ambiguous in light of circumstances surrounding it at the time of its execution. *In re Fortwin Trust* (1973), 57 Wis. 2d 134, 203 N. W. 2d 711; *Estate of Breese* (1959), 7 Wis. 2d 422, 96 N. W. 2d 712.

Art. XII in material part provides:

> "Unless otherwise authorized by the *affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote thereon,* the corporation shall have no authority to sell, exchange, assign, convey or otherwise transfer all or any portion of the real property owned by the corporation: . . ." (Emphasis added.)

The *italicized* language in art. XII is the subject of dispute between the parties, as that language relates to "who" is entitled to vote on proposed sales of land to non-Menominees: the trustees of the voting trust or the individual enrolled Menominees. The trial court concluded that it was the intent of the Menominees in enacting art. XII that such power was to be retained by each enrolled Menominee. It first, however, declared art. XII ambiguous.

In regard to art. XII which along with the voting trust formed the very heart of the Termination Act itself, the trial court entered the following conclusions of law which were incorporated into the interlocutory judgment:

> "3. Article XII of the Articles of Incorporation of Menominee Enterprises, Inc., requiring the 'affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote' before the corporation may sell land to non-Menominees *is ambiguous as it relates to the period of time during which the Corporation's stock is held by the Voting Trust.*
>
> "4. The seven conveyances of land made by Menominee Enterprises, Inc. to Lakes of the Menominees, a partnership, prior to the commencement of this action, *were made without the necessary approval required by Article XII of the Articles of Incorporation and were an improper exercise of the Corporation's power to convey land and are, therefore, invalid.*" (Emphasis added.)

Although the written decision of the trial court does make reference to several of the provisions of the voting trust agreement, it is evident that the court in determining that individual Menominees and not trustees

were authorized to approve land sales to non-Menominees, placed principle reliance on art. XII itself. We think the authorities are to the contrary.

> "The powers and duties of the trustees are to be determined from the trust agreement as a whole, not reading one provision to nullify another and thus defeat the trust." 5 Fletcher, *Cyclopedia Corporations* (1967 rev.) ch. 14, p. 433, sec. 2091.1.
>
> "Powers granted to the trustees by the trust instrument are rarely confined to voting at the election of directors; often their authority specifies the power to vote in all respects as could a full owner of shares, including the right to 'consent' to fundamental changes, increase or reduction of capital stock, sale of all assets, and liquidation of the corporation. The grant of power, however, must be explicit since the trustees are denied any power not clearly granted." 1 Hornstein, *Corporation Law and Practice* (1959), p. 298, sec. 212.

The question, therefore, is whether the voting trust agreement clearly grants authority to the trustees to sell land to non-Menominees. This court concludes that it does.

As prescribed by the Termination Plan, the powers of the trustees of the voting trust were spelled out in art. III of the voting trust as follows:

> "III POWERS OF TRUSTEES 1. *The Trustees, in respect of the stock held by them hereunder, are hereby vested as owners of such stock (without limitation except as herein otherwise expressly provided) with all of the rights, powers, and privileges of every kind and character, of owners thereof, including, without limiting the generality of the foregoing (a) the right to vote the same, as hereinafter provided, for every purpose,* (b) the right to become parties to

> or prosecute or intervene in any suits or other legal or administrative proceedings affecting the stock deposited hereunder, the Company, or the powers, duties or obligations of the Trustees, and (c) the right to transfer all or any part of the Company's stock held hereunder into their names as Trustees or into the name "The Trustees of Menominee Common Stock and Voting Trust." (Emphasis added.)

General language at the beginning of art. III gives the trustees "all of the rights" of owners of the stock, subject to certain exceptions not applicable to the present dispute, followed by the very specific language of sub. (a) which grants to them the right to vote the shares "for every purpose."

Although referring to this language contained in art. III, the trial court at no time tried to reconcile it with its conclusion of ambiguity. Art. III certainly is clear enough and broad enough to authorize the sale of land to non-Menominees. Other language in the trust agreement indicates that certificate holders did not have the right to vote on land sales to non-Menominees.

Art. IV requires the approval of two thirds of the certificate holders before the trustees are permitted to sell the stock. The absence of similar provisions requiring the approval of certificate holders for land sales implies that approval of the certificate holders was not required for land sales.

Art. X of the trust specifically provides that:

> "1. The Trustees may construe this agreement, and their construction made in good faith shall be conclusive and binding upon the parties hereto, . . ."

Such a provision has been recognized in Wisconsin as being valid. *Estate of Koos* (1955), 269 Wis. 478, 492, 493, 69 N. W. 2d 598. As reflected in their vote to per-

mit "MEI" to enter into the partnership agreement with Isaacson, the trustees construed the trust agreement when read on the whole to permit such authorization for land sales on their part. Similarly, the trial court's decision stated that "[n]o attack is made by anyone on the good motives of the trustees."

The trial court's conclusion and the plaintiffs' argument on appeal revolves around what all parties recognize to be the basic concept of this and other voting trusts; namely, that the trustees vote the shares which they hold as an undivided unit. Consequently, they argue that the words "holders of two thirds of the outstanding shares" contained in art. XII becomes functionless when applied to the trustees since each has an interest in all of the shares. In order to secure trustee approval under that provision, the board of directors of "MEI" must obtain a unanimous decision from all the trustees, else not one share will have been voted. This, however, will automatically include 100 percent of the shares and thus, it is impossible for the voting trustees to vote two thirds of the outstanding shares on any matter since individual trustees do not hold divisible amounts of stock. There is but one stock certificate representing this common trust and all the trustees hold all the stock. All must agree or not one share can be voted in approval of land sales. It is undisputed that the voting trustees unanimously approved land sales to non-Menominees.

As already pointed out, the holders of the shares during the existence of the voting trust were the voting trustees. While it is true that the language contained in art. XII may have no effect while the trust is still in existence and while the shares are being voted as a unit by the trustees, it will have a clear and unambiguous

meaning after the trust no longer exists; an eventuality which was within the contemplation of all of the parties at the time the plan was adopted.

We conclude that the trial court in holding art. XII of the articles of incorporation ambiguous was in error.

Conveyance of land from "MEI" to "LOM".

In a supplemental decision, occasioned by orders to show cause brought by the defendants, the trial court held that certain lands conveyed to "LOM" by the approval of the trustees and which were subject to the plaintiffs' lis pendens, could be enjoined from further sale in spite of the rule that an executed conveyance, even though made in an irregular manner, will not ordinarily be upset because of the irregularity. The court's ruling was clearly premised on its belief that art. XII was ambiguous and that only enrolled Menominees could authorize the sale of land to non-Menominees.

Since the trial court was in error on its original premises, it was likewise in error to enjoin the sale of land held by "LOM."

By the Court.—That part of the interlocutory judgment which held the voting trust valid is affirmed. Those parts of the judgment which held art. XII of the articles of incorporation ambiguous; which interpreted that only enrolled Menominees could approve land sales to non-Menominees; and which enjoined the future sale of the land held by "LOM" are reversed.

STATE OF WISCONSIN : IN SUPREME COURT

Henry L. Tomow, Sr., et al.,

Plaintiffs-Respondents,

v.

Menominee Enterprises, Inc., et al.,

Defendants-Respondents,

N. E. Isaacson & Associates, Inc.,

Defendant-Appellant,

No. 508

OPINION ON MOTION FOR REHEARING
(Decided August 14, 1973)

PER CURIAM (On motion for rehearing). It is urged that the opinion of the court, in connection with the number of trustees necessary to cast a vote, can be construed to mean that there must be a unanimous agreement of all the trustees of the voting trust to vote the stock they hold. If this construction can be drawn from the opinion, it is withdrawn. As noted in the opinion, the Trust Agreement in the plan provided the trust could act upon the affirmative vote of five of the seven trustees. This provision of the Trust Agreement was subsequently amended to provide an affirmative vote of seven trustees was required. This was done to accommodate this same amendment which increased the number of trustees from seven to eleven. Thus, as the Trust Agreement now provides, seven affirmative votes of the eleven trustees are sufficient to vote the entire stock held by the voting trust to approve the sale of land to non-Menominees.

Motion denied without costs.

APPENDIX B

STATE OF WISCONSIN CIRCUIT COURT

MENOMINEE COUNTY
Case No. 33

HENRY L. TOMOW, SR., et al.,

Plaintiffs,

vs.

MENOMINEE ENTERPRISES, INC., et al.,

Defendants.

DECISIONS ON MOTIONS
(October 26, 1972)

Subsequent to this Court's decision in the above matter on July 24, 1972, two motions were brought on by orders to show cause. These sought to clarify and limit the injunction which was authorized in the decision. I have now had all of the briefs of counsel and will attempt to deal with questions posed by these motions.

It was agreed at the time of the hearing on these motions that there were 121 sales in which offers of purchase had been accepted, but the delivery of deeds and the formal closing had not occurred. In six of these sales the offer and acceptance had occurred prior to October 24, 1971, which was the date of the filing of the lis pendens in this action. A very substantial amount of money estimated by counsel at close to $900,000 is involved in these contracts of sale. Counsel for Isaacson relies on a well-understood principle of law that an executed conveyance even though made in an irregular manner will not ordinarily be impeached or disturbed because of any irregularity in the exercise of an unquestioned power of the corporation. Section 180.04 and 180.06 are

cited as supporting this position. Counsel's position is stated as follows:

> "Clearly, under Section 180.04, Wisconsin Statutes, and under the Articles of Incorporation, Menominee Enterprises, Inc. had the capacity and power, as a corporation, to make conveyances of land to anyone.
> "It has long been the law in Wisconsin that even an ultra vires contract of a corporation will not be impeached or overturned when that contract is fully executed. The above-quoted case state this rule.
> "This rule has also been codified in Section 180.06, Wisconsin Statutes, which permits a court to enjoin only executory ultra vires contracts."

Counsel makes the further point that even though the irregularities in this case may not be strictly speaking ultra vires acts that the same result would occur citing *Blue River Company* v. *Summit County Development Corporation*, 207 F.Supp. 283. The Court in this case quoted Fletcher, Cyclopedia of Corporations, §3402 as follows:

> "'Another class of corporate contracts which are sometimes said to be ultra vires, although the phrase as applied to them is inaccurate, is where the power exists to do what was done, provided the corporation does it in a certain prescribed way. In other words, the irregular exercise of an unquestioned power of the corporation is not ultra vires. Thus, informalities in connection with consent of stockholders to the contract are often incorrectly referred to as ultra vires, using the term in its strict sense. The fact that the required consent of stockholders is not obtained does not make a contract ultra vires.'"

Counsel for the plaintiffs also cited 180.06(1) for the position that the pending sales may be enjoined. This is the section which provides that in a proceedings by a share-

holder the Court may set aside or enjoin the performance of a contract and at the same time allow compensation for certain damages. It would seem the whole question hinges on whether the transfer of 5,170 acres of land by seven warranty deeds by Menominee Enterprises, Inc. to the Lakes of the Menominees, a partnership, has the effect of a completed or executed transaction. These deeds were recorded prior to the lis pendens. I have concluded that they are not entitled to this standing in the law since Menominee Enterprises, Inc. was one of the partners. The deeds were not final acts but part of an overall joint venture for the sale of these lands to persons seeking to purchase them as cottage sites. In other words it is my judgment that from this standpoint the transfer of the land to the partnership in accordance with the agreement for the sale of this land does not substantially alter the result.

I am of the opinion that the test whether or not the matter is a completed transaction or executory has to be applied with respect to the ultimate purchasers and not to the conveyances to the partnership. Counsel also argues that what this Court has done is to reform the written instruments to reflect the intent of the parties rather than interpret the writings. Assuming this is correct and that it may have an effect on the ultimate result, I don't think it would change the application of the lis pendens considerations.

LIS PENDENS

I am of the opinion that the lis pendens which was filed in this matter has the effect of making all subsequent purchasers subject to the legal proceedings in this case. At the time of the argument I had indicated that I considered that a distinction existed with respect to the six sales in

which the offers had been accepted prior to the filing of the lis pendens. The case of *J and S Corporation* v. *Mortgage Associates, Inc.*, 41 Wis. 2d 418, casts doubt on this distinction. It may be that the time of the recording of the interests of these purchasers is the significant time. The Court in the *J and S Corporation* case, supra said at page 423:

> "The statutes makes immaterial the time when the holder of the unrecorded conveyance or encumbrance in fact received his interest."

For the purpose of this injunction, however, I have decided to exclude these particular transactions although the purchasers themselves may wish to proceed with some caution.

SALES TO MENOMINEES

Counsel has called the attention of the Court to the fact that a question has been raised as the result of this decision in regard to sales by the corporation to Menominees. This decision, of course, does not affect these sales in any way. In my view of the case which considers the plan and its implementation to be valid in every respect, I can see nothing that would in any way challenge the validity of sales to Menominees.

SETTLEMENT AGREEMENT

Counsel makes a very persuasive argument that this Court ought to permit the orderly settlement reached by some of the parties to this case to take its course. This agreement (made part of the record by affidavit) was entered into on July 9, 1972, prior to the decision in this case

but subsequent to the trial. It excludes this litigation. I am always aware of the desirable nature of a good settlement and recognize that many times it produces a better result than a disposition which follows the logic of the law. Assuming, however, that I am correct in my major premise as I must do, I do not see where I have any right to do more than to suggest or recommend a settlement.

PROSPECTIVE APPLICATION

Counsel has also urged that this Court apply its ruling prospectively only permitting all transactions which were entered into prior to the date of the decision to stand. The leading case of *Great Northern Railroad Company* v. *Sunburst Oil and Refining Company,* 287 U.S. 358, is cited for this approach. *Linkletter* v. *Walker,* 381 U.S. 618, and *Gottlieb* v. *Milwaukee,* 33 Wis. 2d 408 are also cited as more recent applications of this rule of law which limits retroactive application of a principle of law to avoid undue hardship. I am not sure that these cases which involve constitutional interpretations apply, but in any event, I believe that as a trial Court I ought not to adopt any such remedy.

CONFUSION RESULTING FROM THE DECISION

I would be of the opinion that it would be better for counsel to attempt to advance the case on appeal than to have the Court adopt some of the other suggestions to avoid unnecessary hardship to the interested parties. I can well understand the concern of counsel in this matter that an appeal of this case may result in a different result.

I would suggest to counsel that I would be glad to meet informally with them to expedite the making and signing of findings of fact and conclusions of law. One thing I

have noted is that some of the delays that have occurred resulted from waiting for exchange of briefs and authorities in the matter. I am concerned, of course, about the extent to which the decision may affect a large number of people. I am mindful too of the most regretable and unnecessary inconvenience to many persons which would result if the Supreme Court would reach a different decision on the basic question in the case. I will, therefore, make myself available at the earliest possible time that counsel wish to get out the findings of fact and conclusions of law.

Counsel at the time of the hearing on these motions for clarification have discussed some of the remaining aspects of this case which would have to be resolved eventually. I would prefer not to deal with any other remedies. It is my hope that the basic question could be resolved finally before anything further is done by this Court which would affect the rights of persons in these lands.

Dated this 26th day of October, 1972.

BY THE COURT:

/s/ *William J. Duffy*

Circuit Judge

STATE OF WISCONSIN CIRCUIT COURT
MENOMINEE COUNTY
Case No. 33

HENRY L. TOMOW, SR., et al., Plaintiffs,

vs.

MENOMINEE ENTERPRISES, INC., et al., Defendants.

DECISION
(July 24, 1972)

FACTS

Counsel have stipulated to many of the facts in the formal stipulation covering 24 paragraphs. Most of the facts are agreed to, and only in a relatively narrow area is there a dispute.

The Menominee Indian Tribe was well established in Wisconsin 200 years prior to the appearance of the European settlers. Except for a small cession of land to the Stockbridge-Munsee Reservation, the last of a series of treaties between the United States and the Menominee Tribe occurred in 1854, "The Treaty of Wolf River." Under the treaty the Menominees ceded land to the United States, and the United States agreed to give to the Menominees the land on which the present Menominee County is laid out. Until termination, which became effective on April 30, 1961, tribal affairs were conducted by the General and Advisory Councils. The General Councils were meetings open to the entire tribe with all adult enrolled Menominees being able to vote. The Advisory Council created in 1928 was an elected body concerned primarily

with the business management of day-to-day affairs. Its actions could be overturned by a vote of the General Council or by the Secretary of the Interior.

In 1953 Congress by concurrent resolution instructed the Secretary of the Interior to recommend legislation for the withdrawal of the federal supervision over the Menominees as well as other named tribes. In 1954 Congress passed the Termination Act, P. L. 399, 25 U.S.C.A. 892-902. It was later amended on July 14, 1956, July 2, 1958 and September 8, 1960.

In November, 1957, a General Council of the tribe created the Coordinating and Negotiating Committee, hereinafter referred to as the C and N Committee. Its purpose was to develop a termination plan under the authority from the General Council which created it. In December of 1957 the final roles of membership in the Menominee Tribe were closed, and the membership list of 3,270 persons was published in the *Federal Register*. A "Termination Plan" was proposed to the General Council in a series of three meetings in January of 1959. As amended by those present, the plan was approved by a vote of 91 to 16 on January 17, 1959. Details for the implementation of the plan were contained within the plan itself.

The opening language of the plan reads as follows:

"The Plan consists of the following documents:

1. Statement of the Plan and Description of its Objectives and Goals (revised December 1, 1960).
2. Articles of Incorporation of Menominee Enterprises, Inc. (revised November 30, 1959).
3. By-Laws of Menominee Enterprises, Inc. (revised November 30, 1959).
4. Menominee Common Stock and Voting Trust (revised November 30, 1959).

5. Menominee Assistance Trust (revised November 30, 1959).

6. Menominee Enterprises, Inc., Bond Indenture (form of bond included) (revised November 30, 1959).

7. Menominee Indian Tribe, Certificate of Beneficial Interest.

"In addition the following documents are included by reference:

1. Resolution of General Council, Menominee Indian Tribe, January 17, 1959.

2. Resolution of General Council, Menominee Indian Tribe, July 27, 1959.

3. Resolution of Advisory Council, Menominee Indan Tribe, July 28, 1959.

4. Letter of Glen A. Wilkinson, Attorney for Tribe, to Secretary of Interior, July 31, 1959.

5. Letter from Acting Secretary of Interior to James G. Frechette, Chairman, Menominee Advisory Council, July 31, 1959.

6. Letter from Acting Secretary of Interior to James G. Frechette, Chairman, Menominee Advisory Council, October 30, 1959.

6a. Letter from George W. Abbott, Assistant Secretary of Interior to Jerome Grignon, Chairman, Menominee Advisory Council, January 9, 1961.

7. Copies of Chapters 258, 259 and 260, Laws of Wisconsin, 1959."

Pursuant to the plan, the trustees were elected by the General Council. The members of the C and N Committee as incorporators of Menominee Enterprises, Inc., hereinafter referred to as MEI, subscribed to all of the stock in MEI. The directors whose names appeared on the article, who had been previously chosen informally, were formally chosen by the trustees. The directors accepted the subscription of the committee. The Secretary of the Interior

advanced $327,000 of the funds he was holding in trust, and that money was used to pay for the stock. The corporation issued a single stock certificate to the C and N Committee for 327,000 shares of stock. The committee signed the Voting Trust Agreement and named as trustees those individuals previously approved by the General Council and transferred the stock in MEI held in their name to the Voting Trust. The trustees then issued certificates to enrolled Menominees as evidence of their interest in the stock the trustees held.

On August 10, 1967, the Board of Directors and the trustees jointly passed a resolution which reads as follows:

> "WHEREAS, there is no other means sufficiently capable of accomplishing the economic improvement of the Menominee community except by adoption and implementation of the Ernst & Ernst Report; and
>
> "WHEREAS, to provide necessary tax resources for Menominee County and/or the Town of Menominee and for the relief of taxation on Menominee Enterprises, Inc. (and the residents of Menominee County, Wisconsin), and to assure continued Menominee ownership thereof:
>
> "I. BE IT RESOLVED, that Menominee Enterprises, Inc. is authorized to proceed with the recommendations of the Ernst & Ernst Report as opportunity and feasibility permit; and
>
> "II. RESOLVED FURTHER, that the corporation is authorized to define economic development zones on its land in Menominee County, Wisconsin, not to exceed 8,760 acres in areas to be defined and described from time to time by the Menominee Common Stock & Voting Trust and/or the shareholders of the Corporation, whichever then holds the common stock; and

"III. RESOLVED FURTHER, that pursuant to Article XII of the Articles of Incorporation of Menominee Enterprises, Inc. within such economic development zones warranty deeds may issue as a form of land transfer, provided a sufficient form of quality control is a condition of such transfer, and provided always that sufficient areas of land on lakeshore be reserved for Menominee use."

On September 23, 1967, a referendum was held, and all holders of Voting Trust Certificates were invited to express their opinions. Of a total of 109,125 votes cast, 97,738 were for and 11,387 were against the resolution. Among the "yes" votes were 79,362 votes cast by First Wisconsin Trust Co. which voted the interests of minors and incompetents. The referendum was announced as "advisory," and the written material distributed referred to the use of warranty deeds.

On July 9, 1968, MEI and N. E. Isaacson and Associates, hereinafter referred to as Isaacson, entered into a joint agreement calling themselves Lakes of the Menominees, hereinafter referred to as LOM. They planned to develop and sell to persons including non-Menominees certain lands situated in that part of the economic zone and approved for development. The joint venture agreement was subject to the approval by the trustees which was given by unanimous resolution in July of 1968. In 1969 Isaacson and MEI agreed to increase the number of lots to be developed and sold from 1,800 to 2,600.

On February 4, 1972, at a Board of Directors meeting, the legal status of the LOM contract was raised. The original agreement stated that it dissolved as of December 31, 1971, unless extended by the parties. At a reconvened

meeting of the Board of Directors on February 11th, it was decided that the executive committee would meet with Isaacson to explore the possibility of negotiations on a contract.

On March 17, 1972, the Board of Directors voted in favor of continuing the LOM contract to December 31, 1972. The presidentof MEI thereupon confirmed the extension in writing to Isaacson which agreed to the extension. Since December 31, 1972, no action was taken by certificate holders or trustees concerning land sales to non-Menominees.

In April, 1972, six trustees out of eleven signed affidavits at the request of Plaintiffs' counsel that they opposed the sales to non-Menominees. If a vote were taken, they indicated they would vote against such sales.

The original pleadings were amended to set forth these facts and to allege a lapse of the contractual relationship. A motion for a temporary injunction against any further sales was denied by this court in a decision dated the 24th of April, 1972.

The Termination Act, 25 U.S.C.A., contains the following language:

> 25 U.S.C.A. 893
>
> ". . . the rights or beneficial interests of each person whose name appears on the roll shall constitute personal property and shall be evidenced by a beneficial interest which shall be issued by the tribe. Such interests shall be distributable in accordance with the laws of the State of Wisconsin. Such interests shall be alienable only in accordance with such regulations as may be adopted by the tribe."

25 U.S.C.A. 896

"The Secretary shall accept such tribal plan as the basis for the conveyance of the tribal property if he finds that it will treat with reasonable equity all members on the final roll of the tribe prepared pursuant to Section 893 of this title, and that it conforms to applicable Federal and State laws."

Others facts will be mentioned in the decision.

ISSUES

This suit is by 162 Menominees against Menominee Enterprises, Inc. and the officers and directors of Menominee Enterprises, Inc., and the trustees of the Menominee Common Stock and Voting Trust and Isaacson, a partner with Menominee Enterprises, Inc. in the Legend Lake Development.

Plaintiffs contend that the Voting Trust was not set up pursuant to Section 180.27, Wisconsin Statutes, which reads as follows:

> "Any number of shareholders of a corporation may create a voting trust . . . by entering into a written agreement . . ." (Section 180.27 W.S.A., App. p. iii.)

Plaintiffs' also contend that the trustees did not have the power or the authority under Article XII of the Articles of Incorporation to authorize the sale of lands to non-Menominees. In the amended complaint referred to above, plaintiffs also contend that even if the LOM agreements were originally valid that due to the automatic termination of the agreement and the present make-up of the trustees there was no longer any authority for the sale of land after December 31, 1971.

The defendants contend, of course, that the trust was validly set up and that Article XII was complied with by the unanimous vote of the trustees and that the failure to take action prior to the termination date established in the contract was cured by action taken afterwards and properly ratified. Defendants also take the position that the main issues raised by the plaintiffs are res judicata as the result of two earlier circuit court cases.

ISSUE OF RES JUDICATA

The two cases on which defendants rely are *White, et al.* v. *Kenote, et al.* and *Lakes of the Menominees* v. *Agnes Dick, et al.*, both Menominee County Circuit Court cases. In the *White* case, the trial court dealt with certain provisions of the Voting Trust and the Assistance Trust as they related to the holding of an election to determine whether the Voting Trust should be renewed pursuant to Article XII paragraph 2 of the Voting Trust Agreement.

The decision of that court assumes the validity of both the Voting Trust and the Assistance Trust which in the argument of the defendants has the effect of making this matter res judicata since the validity of the trust could have been raised at the time of the trial. In my view of the law, the Voting Trust is valid. Therefore, this issue is not dealt with at length. However, in the presentation of the case, I attempted to permit counsel to make as complete and full a record as each felt they should.

In the *Lakes of the Menominees* case, individual members of an organization called DRUMS were enjoined from picketing the business office of the Legend Lakes project of LOM. Some of them are plaintiffs here. I doubt very seriously that the issue of the authority of the trustees to

vote for the sale of lands to non-Menominees would be properly litigated in that matter. In my judgment it would be collateral and not necessary to the plaintiffs' case. The trial court indicated he had not made a study of the title issue although he indicated he would approve a finding of title in LOM. (Exhibit 25, page 40) In his findings of fact, he found that the LOM had deeds from MEI. In his conclusions of law, he does not mention title.

The principle of res judicata applies when a prior lawsuit has involved indentity of the thing sued for, identity of the causes of action, identity of the parties and the quality and capacity in which they appear in the litigation. *Gohr* v. *Beranek* (1954) 266 Wis. 605, 609, 64 N.W. 2d 246; *Cohan* v. *Associated Fur Farms, Inc.* (1952) 261 Wis. 584, 598, 53 N.W. 2d 788, 795; and *Conway* v. *Division of Conservation* (1971) 50 Wis. 2d 152, 160, 183 N.W. 2d 77.

I have concluded that this case cannot be decided on the principles of res judicata because the issues as well as the parties are substantially different.

ISSUE OF THE VOTING TRUST

Defendants make a very urgent argument that the failure to follow the statutory requirements of Section 182.07 is contrary to the Termination Act which provides in part as follows:

> "... that it conforms to applicable Federal and State laws."

Defendants make the point that this section of the Wisconsin Statutes is a codification of the common law rule that voting trusts must be in writing to comply with the Statute of Frauds.

Plaintiffs' counsel cites a number of precedents from different jurisdictions which, in effect, do indicate that courts have been concerned with the manditory nature of the compliance with similar statutes. These cases suggest that public policy considerations are involved which would be in addition to the Statute of Frauds purposes. It is my judgment that neither the purposes contemplated by the Statutes of Frauds or the public policy considerations raised by plaintiffs are involved here. The plan clearly contemplates the procedure which was actually followed. As defendants' counsel points out, the members of the C and N Committee signed the written agreement of trust in accordance with the plan. The plan also provided for the transfer of the shares of stock to the trust sometimes in advance of termination even before the corporation owned the assets of the Menominee Tribe.

Plaintiffs' counsel in answer to this points out that in the legislation passed in 1954 establishing the Menominee Rolls each Menominee was given a vested interest. From this fact counsel argues that a proper compliance with Section 180 would require a written consent of each holder of such interest. It is my judgment that this

literal interpretation is probably overtechnical. I am impressed by the reasonableness of the method established in the plan contrasted with the unwieldy procedure of having the shares issued to the individual Menominees some of whom would be minors or incompetents and then placed in trust under the procedural requirements of Section 180.27. It is obvious that a trust arrangement was considered in the best interests of the Menominees in accordance with their own plan. It seems to me the procedure adopted to accomplish this was eminently sensible. I cannot conclude that the plan approved by the Secretary of the Interior fails because it violates applicable state law in this respect.

It is my judgment, therefore, that the Voting Trust is not invalid for a failure to comply with Wisconsin law. I should note that plaintiffs contend that other individuals in Wisconsin would not be bound by a voting trust agreement which failed to follow this statute and that, therefore, there is a violation of the Fourteenth Amendment ". . . nor shall any state . . . deny to any person with its jurisdiction the equal protection of the laws."

Also defendants claim that the Fifth Amendment to the Federal Constitution is violated: ". . . nor shall any person . . . be deprived of life, liberty or property, without due process of law. . . ."

POWER OF THE TRUSTEES TO VOTE THE SHARES AUTHORIZING THE SALE OF LAND

Parol Evidence Rule

Defendants claim throughout that the authority of the trustees is contained within the four corners of the written instruments comprising the plan; that there is no ambiguity and consequently no basis for the reception

of parol evidence. *Pines* v. *Perssion,* 14 Wis. 2d 590, 594, 11 N.W. 2d 409 (1961); *Hart* v. *Hart,* 117 Wis. 639, 648-649, 94 N.W. 890 (1903).

Defendants' counsel further argues that the parol evidence rule operates with special force when the meaning in a federal statute or regulation is at issue.

> "The legislative will must be ascertained from the text of a statute if the words are clear and plain and the whole enactment internally cohesive." *Fisher Flowing Mills Company* v. *United States,* 270 F.2d 27, 30 (9th Cir. 1958).

It is pointed out that the language in the trust agreement uses the words, "holders . . . entitled to vote thereon." Attention is also drawn to Article III of the Trust Agreement which states that the stock held may be voted without limitation except as expressly provided. Emphasis is placed by defendants' counsel on the language contained in paragraph one of Article X of the Trust which provides as follows:

> "The Trustees may construe this agreement, and their construction made in good faith shall be conclusive and binding upon the parties hereto. . ."

Counsel for the plaintiffs on the other hand insist that extrinsic evidence is admissible to show the intent of the parties because there is an ambiguity contained in the writings. Their brief makes this statement:

> " 'Holders of two-thirds of the outstanding shares' becomes functionless when applied to the trustees. Each has an interest in all the shares. In order to obtain trustee approval under that provision, the Board must get a unanimous decision from all the trustees thereby automatically including 100 percent of the shares. Or does it mean two-thirds of the holders?"

Still another interpretation in addition to the two mentioned in the paragraph quoted above is the third and probably more logical one that a simple majority of the trustees could authorize the sale of real estate if this authority granted in this article can be exercised by the trustees. At the time of the adoption of the pertinent language in Article XII, there was a provision for only seven trustees. This was subsequently changed to eleven.

I have concluded that the language is ambiguous as it relates to the interum period during which time the trustees held the voting shares. The situation in April of 1972 when six of the eleven trustees signed an affidavit that they would oppose the sale of lands to non-Menominees highlights the problem of interpretation.

The parol evidence rule excludes extrinsic evidence unless the writing is ambiguous, unclear, indefinite or contradictory.

> "In determining whether a writing is ambiguous, the court does not merely examine the document, but scrutinizes the language of the document in light of the surrounding circumstances. Consequently, parol evidence must at least be provisionally admitted in order to develop these circumstances. If the court concludes that on the basis of such extrinsic proof a reasonable man could interpret the writing to mean anything other than what the ordinary meaning of the words indicate, then parol evidence may be received to establish what was meant by the writing. Or if the parol evidence shows that a literal application of the language of the writing would lead to an absurd result, the extrinsic proof may be relied upon to arrive at a rational construction of the writing which effectuates what appears to have been the intention of the parties." *Wisconsin Civil Trial Evidence* §9.31 Determining Existence of Ambiguity.

In the course of the trial, extrinsic evidence was permitted over objection of counsel for the defendants which I believe was procedurally the correct method to follow.

> "(2) Procedural Aspects of Application of Rule. The parol evidence rule may be the basis for rejecting evidence when it is offered, or for refusing to consider evidence, which has been received, from the ultimate decision at the end of the trial. Frequently, the court is unable to determine whether the parol evidence rule should be applied until sufficient extrinsic evidence has been developed in the record. Regardless of when the rule is applied, however, the critical question is whether the writing expresses the complete and correct integration of the terms on which the parties agreed." *Wisconsin Civil Trial Evidence* §9.14 Substantive and Procedural Aspects.

I am aware that the decision whether to admit extrinsic evidence involves a judgment to be made by the trier of facts. I am aware that this brings into play a number of considerations on which reasonable people can differ. Certainly in this case they have differed. Counsel for the defendants have argued throughout that I avoid making a decision on rhetoric. Underlying our discussions was an appreciation of the fact that American history is replete with instances where the Indians have claimed that land was wrongfully taken from them. I would not be candid if I indicated that this was not a concern of this Court. At the same time I did make an effort to separate this general proposition from the statements and actions of the individuals in this case in an effort on my part to find out what the true intent of the Menominees was with respect to the sale of land.

Ordinarily our law does not favor restrictions on alienation, and a proper construction of the trust agreement would probably place the power of sale in the trustees.

However, I consider that this is not an ordinary trust agreement but one that requires a consideration of the background and an interpretation of the plan against the proper setting. I cannot escape the conclusion that the systematic sale of these lands for purposes of obtaining revenue with the additional purpose of building a tax base was not within the contemplation of the Menominees at the time of the adoption of the plan.

Intent

On the question of the intent to be found in the plan, I start with the proposition that it is basically the plan of the Menominee Indians. The Secretary of the Interior approves of the plan under the federal statute if it meets certain conditions. I am of the opinion that to determine the intent of the framers of the plan that the minutes of the tribal meetings as well as the minutes of the Advisory Council and the C and N Committee were all proper and competent evidence.

I find from a reading of the minutes of the General Council of November 6th and 7th, 1957, and minutes of the Advisory Council of January 3, 1957, that the council retained authority over the C and N Committee. Minutes of the meeting of August 14, 1958, (Plaintiffs' Exhibit No. 7) indicate at the outset a deep concern that the land would get into the hands of outsiders. An informal vote resulted in voting for leases only at that time and a small number for a combination of leases and sales with options to repurchase. At a General Council meeting called for January 9th and 10th, 1959, Article XII was originally presented reading as follows: (Plaintiffs' Exhibit No. 9)

> "Unless otherwise authorized by the affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote thereon, the

corporation shall have no authority to sell, exchange, assign, convey or otherwise transfer all or any portion of the real property owned by the corporation, other than real property designated by the board of directors as forest lands; provided, however, that the board of directors, or the appropriate officers at its direction, shall have authority to lease, mortgage or pledge all or any portion of such property, on such terms and conditions as it shall deem advisable, without shareholders' consent."

In the meetings of both January 9th and 10th, 1959, challenges were made to giving the Board of Directors power to sell land. All of the expressed sentiment was against sales of any land. No one spoke in favor of any limited or emergency sales. Even one to the State of Wisconsin for park purposes was discussed adversely by Mr. Gordon Dickie, a member of the C and N Committee who was a witness in this case. The meeting was adjourned until January 17th when the chairman announced there was no longer a quorum.

On January 17th Article XII was resubmitted in a form which gave no power of sale to the Board of Directors without approval of two-thirds of the shareholders. It provided that the Board of Directors would have authority to lease real property other than lands designed as forest lands. This was the language approved by the General Council on the meeting of January 17, 1959. (Plaintiff's Exhibit No. 11)

There was throughout the tribal discussions of Article XII a concern that individual Menominees should be protected in the rights to the land that they had been occupying. On April 14, 1959, the Advisory Council passed a resolution to submit an amendment to Article XII. An explanation was sent to individual Menominees

suggesting that the Board of Directors be given the power of sale to Menominees pointing out that representatives of the State of Wisconsin had objected to this restriction on alienation. (Plaintiffs' Exhibit No. 14)

At the January 17th meeting, Mr. George Kenote, another member of the C and N Committee who testified on behalf of the defendants in this case had explained to the council that securring a two-thirds approval would make it difficult to sell individual homesites.

The final language gave the Board of Directors this authority instead of the leasing arrangements. The additional language read as follows:

> ". . . and provided, further, that the board of directors, or the appropriate officers at the direction of the board of directors, shall have authority to sell and convey to individuals, who were enrolled tribal members under Public Law 399 (final roll) or their heirs at law, individual parcels which in the aggregate will not exceed 14,500 acres for homesites, agricultural use or other development, which lands shall be zoned for that purpose and shall not include lands designated as forest lands."

I found no discussion in any of the minutes as to whether the trustees would have the right to exercise the authority to sell contained in Article XII during the period that the shares were in trust. I do find contained in all these writings a strong, consistant opposition to the sale of any lands even to the State of Wisconsin for park purposes. Most of the plan was not discussed in any depth. The attorney general in his report of the plan (Defendants' Exhibit No 35) complained of this. Proportionately the sale of land was more thoroughly discussed.

No attack is made by anyone on the good motives of the trustees. Evidence was offered by defendants to show the serious financial troubles which beset the corporation. There was a need for revenue and the advantageous tax base created by the sale and improvement of these lots. It is easy to understand how the trustees were motivated to seek this solution to the financial problems. Objection was made to the admission of this evidence. I did consider this evidence, but I do not believe that it is persuasive with respect to the power of the trustees to exercise the authority to sell.

Counsel for defendants point to the Attorney General's report as indicating that the power of sale was in the shareholders. The exact language of the report reads as follows: (Defendants' Exhibit No. 35 p.4)

> "Sale of land is expressly prohibited except pursuant to a vote of two-thirds of the stockholders who should be the voting trustees for at least 10 years."

Counsel also points to a June 1, 1959, edition of the *Menominee News* which was sent out to all tribal members. This statement appears at page 16 of Defendants' Exhibit 37:

> ". . . but sale of land is prohibited unless two-thirds of the stockholders vote otherwise, and in this case the voting stockholders would be the voting trustees for at least 10 years."

I consider these two statements can be reconciled as readily on the basis of reassuring the Menominees as alterting them to the probability of sale during the period the stock was held in trust.

One other incident is cited by defendants' counsel in which then Attorney General John Reynolds asked one

Jennie Wesso about land sales at a meeting held in Keshena in April of 1959. She replied that a two-thirds of the majority vote of the Menominee Tribe would be necessary. Then Mr. Reynolds asked her if she understood that the trustees would be voting the stock instead of the tribe. She then indicated she did understand. I think this incident was significant because it was the only written record of discussion of this kind, and it certainly is far short of indicating that even one Menominee clearly understood that the land would be subject to sale by the trustees.

Article XII is given the same dignity in the Articles of Incorporation as Article X which provides that the articles may be amended by affirmative vote of the holders of at least two-thirds of the shares entitled to vote thereon. It seems improbable to me that from all of the evidence that one could conclude that the Menominees ever intended that the trustees should exercise the power of sale of lands as an ordinary business operation. It is in my opinion out of harmony and out of character with all of the expressed sentiments contained in the tribal minutes. Mr. Kenote and Mr. Dickie both testified to oral conversations in which they explained this to individual Menominees. I have decided to admit this evidence, but its persuasiveness is far less than the writings.

I am most impressed by the deliberate selection of a very difficult and involved machinery to authorize the sale of land. Acquiring the consent of two-thirds of all the shareholders is so different from the simple matter of securring the approval of the trustees whether it is unanimous, two-thirds or a simple majority. It also appears to me to involve a kind and a quality of consent by the Menominee people which cannot be supplied by

a few persons sitting as trustees no matter how conscientious and concerned they are for the well-being of the beneficiaries for whom they are acting.

REMEDIES

At pretrial discussions, although I do not have a written note of it, a procedure was discussed to permit the Court to make a ruling on the legality of the sale of lands without taking evidence in support of any of the remedies other than the injunction. Even though this was not reduced to a formal stipulation, the trial did proceed on that basis. In argument counsel pointed out the confusion that would ensue if the legality of titles was challenged since many of the lots have been sold and people have obtained rights in them. It should be pointed out that this suit does not attempt to reach any of the sales made earlier. The pleadings specifically exclude earlier sales. I certainly do not intend to pass any judgment on what should be the remedy with respect to any land already sold prior to suit or since its commencement. I do not believe I should consider this problem in connection with deciding whether there was power to sell.

Counsel have also acquainted the Court with a settlement that was reached involving future sales of lots, although it was never made part of this record and probably should not be.

COUNSEL

I have appreciated the excellence of all counsel in this case representing both plaintiffs and defendants. I have received most helpful briefs. Their industry and candor was outstanding. I did not think I should pass up this opportunity to compliment them.

Realistically I look forward, in the absence of a complete settlement of this matter, to an appellate review of this decision.

I would, therefore, limit my judgment with respect to remedies at this time to the granting of an injunction against any further sales of lands with the understanding that jurisdiction would be retained to consider evidence in support of other remedies at a later date.

Counsel for the plaintiffs may prepare findings of fact and conclusions of law in accordance with this decision.

Dated at Green Bay, Wisconsin, this 24th day of July, 1972.

BY THE COURT:

/s/ *William J. Duffy*
William J. Duffy
Circuit Judge

APPENDIX C

STATE OF WISCONSIN CIRCUIT COURT

MENOMINEE COUNTY
Case No. 33

HENRY L. TOMOW, SR., et al.,

Plaintiffs,

vs.

MENOMINEE ENTERPRISES, INC., et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(Issued: Nov. 16, 1972)

This is a Menominee County action, commenced by 162 Plaintiffs who are either shareholders and/or holders of voting trust certificates and who brought this action in the right of the Menominee Enterprises, Inc., being shareholders of not less than three percent (3%) of the MEI shares issued and outstanding;

A summons and complaint were filed in the Circuit Court for Menominee County, Wisconsin on October 25, 1971, and a Lis Pendens containing the names of the parties, the object of the action and a description of the land involved in the action was filed with the office of the Register of Deeds in Menominee County on October 25, 1971;

On November 11, 1971, the Defendants, other than Georgianna W. Ignace and Ada Deer, moved the court:

1. For an order granting them summary judgment dismissing Plaintiffs' complaints on those merits;

2. In the alternative, for an order advancing the case on the calendar for trial in accordance with Wis. Stats. §270.12(2).

On November 18, 1971, an Affidavit of Prejudice was filed, and, subsequently, by Order of the Wisconsin Supreme Court dated November 24, 1971, I, William J. Duffy, Circuit Judge, Branch III, for the Fourteenth Judicial Circuit Court, was assigned to act in the matter in the Tenth Judicial Circuit;

On November 19, 1971, the Defendants, other than Georgianna W. Ignace and Ada Deer, filed an answer to the complaint;

On November 19, 1971, the Defendants, Georgianna W. Ignace and Ada Deer served and filed identical answers to the original complaint where they admitted each and every allegation of the original complaint;

On December 10, 1971, the motion for summary judgment and in the alternative to advance the case for early trial was argued and on February 7, 1972, the motion for summary judgment was dismissed;

On April 21, 1972, a hearing was held by the Court on Plaintiffs' motion requesting a temporary injunction prohibiting sale of land to non-Menominee while the action for permanent relief was pending. The Court denied Plaintiffs' request on April 24, 1972;

On April 21, 1972, a hearing was also held by the Court on Plaintiffs' motion requesting leave to file a Supplemental Complaint which was approved by Stipulation on said date. The Supplemental Complaint alleged facts material to the case which occurred after the complaint was made, and added Carol Dodge, Gordon Keshena, and

Robert Deer as Defendants to the action as a result of subsequent elections which elected Carol Dodge as trustee and Robert Deer and Gordon Keshena as directors of Menominee Enterprises;

Copies of the Summons, Complaint, and Supplemental Complaint were served on Carol Dodge, Gordon Keshena, and Robert Deer. The three new Defendants did not file answers to the original Complaint or to the Supplemental Complaint;

On May 2, 1972, an answer to the Supplemental Complaint was filed on behalf of the Defendants other than Georgianna W. Ignace and Ada Deer.

The Defendants Georgianna W. Ignace and Ada Deer did not file an answer to the Supplemental Complaint although a Supplemental Complaint was served upon their Attorney, J. Edison Woods, of Madison, Wisconsin. This action came for trial to the Court, without a jury, on the 8th day of May, 1972. A Stipulation was entered into by the parties. The Plaintiffs appeared by their Attorneys, Ruth S. Downs and Warren A. Kenney of the Wisconsin Indian Legal Services of Madison, Wisconsin and Attorney Joseph F. Preloznik of Madison, Wisconsin; and the Defendants, excepting the Defendants Georgianna W. Ignace and Ada Deer, Carol Dodge, Gordon Keshena, and Robert Deer, appeared by their Attorney, Gilbert W. Church, of the Milwaukee law firm of Foley and Lardner; the Defendants Georgianna W. Ignace, Ada Deer, Carol Dodge, Gordon Keshena, and Robert Deer did not appear either in person or by counsel at the trial;

On July 14, 1972, there was further argument before the Court; at that time Gilbert W. Church appeared for the Defendants other than Georgianna W. Ignace, Ada

Deer, Carol Dodge, Gordon Keshena, and Robert Deer and N. E. Isaacson. Vance Waggoner appeared on behalf of N. E. Isaacson and Ruth S. Downs of Wisconsin Indian Legal Services and Joseph F. Preloznik appeared on behalf of the Plaintiffs;

On July 24, 1972, the Court issued a written decision wherein certain issues were determined and jurisdiction was retained for the later determination of other issues;

Thereafter, the Defendant, N. E. Isaacson & Associates, Inc. brought two Motions on before the Court seeking supplemental decisions of the Court clarifying points in the Decision of July 24, 1972;

These two Motions were heard by the Court on July 31, 1972, and on August 10, 1972, respectively, and the Court having heard oral argument of all Counsel and having received and considered Statements of Position and Briefs from Counsel, a second and supplemental Decision disposing of these Motions was rendered on October 26, 1972;

NOW, THEREFORE, the Court hereby makes and files the following Findings of Fact and Conclusions of Law in accordance with its Decisions of July 24, 1972, and October 26, 1972, and the record herein.

FINDINGS OF FACT

1. The Menominee Indian Tribe was well-established in Wisconsin two hundred years before the European settlers began their westward movement across the United States.

2. Except for a small cession of land for the Stockbridge-Munsee Reservation, the last of a series of treaties between the United States and the Menominee Indian

Tribe was the "Treaty of Wolf River" of 1854. Under this Treaty, the Menominee Indians, among other things, ceded land to the United States, and the United States agreed to give certain lands to the Menominee of which the larger part constitutes present-day Menominee County.

3. Until termination became effective on April 30, 1961, tribal affairs were handled by the tribe in General Councils and by the Advisory Council. The General Councils were meetings open to the entire tribe, at which all adult enrolled Menominees could vote. The Advisory Council, created in 1928, was an elected body that concerned itself primarily with business management of day-to-day affairs. Its actions could be overturned by a vote of a General Council or by the Secretary of the Interior.

4. In 1953, Congress, by concurrent resolution, instructed the Secretary of the Interior to recommend legislation for the withdrawal of Federal supervision over the Menominees, as well as other named tribes.

5. In 1954, Congress passed the Termination Act, P.L. 399, 25 U.S.C.A. 892-902. It was later amended on July 14, 1956, July 2, 1958, and September 8, 1960.

6. In November, 1957, a General Council of the Tribe created the Coordinating and Negotiating Committee, herein called the "Committee". Its function was to develop a termination plan such as was called for by the Termination Act. It acted under authority from the General Council which created it and under the Advisory Council.

7. In December, 1957, the final rolls of membership in the Menominee Tribe were closed and the membership list of 3270 persons was published in the Federal Register.

8. A "Termination Plan" was proposed to a General Council in a series of three meetings in January of 1959. As amended by those present, the Plan was approved by a vote of 91 to 16 on January 17, 1959. All of the expressed sentiment was against sales of land. No one spoke in favor of any limited or emergency sales.

9. Part of that Plan called for the creation of a corporation under Wisconsin Law known as Menominee Enterprises, Inc. and for the creation of a Menominee Common Stock and Voting Trust, herein called the "Voting Trust." I found no discussion in any of the minutes as to whether the trustees would have the right to exercise the authority to sell contained in Article XII during the period that the shares were in trust.

10. Individual members of the Tribe did not enter into written agreements creating the voting trust. Whatever legal assent exists on the part of the Menominee Indians to the establishment of the voting trust, emanates from the votes of the General Council.

11. In completing the corporate arrangements, the following procedure was followed:

a. The initial Trustees of the Voting Trust were elected by the General Council;

b. The members of the Coordinating and Negotiating Committee signed as incorporators of Menominee Enterprises, Inc., herein called "MEI", a corporation organized under the laws of Wisconsin.

c. The Coordinating and Negotiating Committee subscribed to all the stock of MEI. During this organizational meeting, the elected directors, whose names appeared on the Articles and who had been previously chosen informally, were formally chosen by the Trustees.

d. The Directors of Menominee Enterprises, Inc., accepted the subscription of stock previously made by the members of the Coordinating and Negotiating Committee.

e. The Secretary of the Interior advanced the sum of $327,000.00 of funds he was holding in trust as payment for the 327,000 shares of stock;

f. Menominee Enterprises, Inc. issued a single stock certificate to the Co-ordinating and Negotiating Committee for 372,000 shares of stock.

g. The Co-ordinating and Negotiating Committee executed the Voting Trust Agreement, naming as Trustees of the Voting Trust those individuals previously approved by the General Council.

h. The Co-ordinating and Negotiating Committee subsequently transferred the stock in Menominee Enterprises, Inc., which the MEI held, to the Menominee Common Stock & Voting Trust.

i. The Trustees, thereupon, issued Voting Trust Certificates to the enrolled members of the Menominee Tribe as evidence of the beneficial interest of such enrolled members in the stock held by the Trustees.

12. The Articles of Incorporation of Menominee Enterprises, Inc., contain, among other things, the following provision:

"ARTICLE VII — VOTING TRUST"

"The shareholders of the corporation may, as provided by law, create a voting trust for the purpose of conferring upon trustees the right to vote or otherwise represent their shares, by entering into a writ-

ten voting trust agreement specifying the terms and conditions of the voting trust, and it is contemplated that all of the shares initially issued by the corporation shall be placed in a voting trust."

13. Wisconsin Statute 180.27, contains the Voting Trust provisions as follows:

"180.27 Voting trust. Any number of shareholders of a corporation may create a voting trust for the purpose of conferring upon a trustee or trustees the right to vote or otherwise represent their shares by entering into a written voting trust agreement specifying the terms and conditions of the voting trust by depositing a counterpart of the agreement with the corporation at its registered office and by transferring their shares to such trustee or trustees for the purposes of the agreement. . . ."

14. The Articles of Incorporation of Menominee Enterprises, Inc., contain, among other things, the following provision:

ARTICLE XII — SALE OF LAND

"Unless otherwise authorized by the affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote thereon, the corporation shall have no authority to sell, exchange, assign, convey or otherwise transfer all or any portion of the real property owned by the corporation. . . ."

15. The Agreement creating the Menominee Common Stock & Voting Trust contains, among other things, the followng provisions:

"III. POWERS OF TRUSTEES"

1. The Trustees, in respect of the stock held by them hereunder, are hereby vested as owners of such stock (without limitation except as herein otherwise

expressly provided) with all of the rights, powers, and privileges of every kind and character of owners thereof, including, without limiting the generality of the foregoing (a) the right to vote the same, as hereinafter provided, for every purpose, ..."

16. By two deeds, both dated April 26, 1961, and recorded September 10, 1961, in the Office of the Register of Deeds for Menominee County, Wisconsin, the United States of America conveyed to Menominee Enterprises, Inc., all of the real estate which, for practical purposes, previously constituted the Menominee Indian Reservation, and presently constitutes Menominee County, Wisconsin, which real estate included the lands at issue in this action.

17. On August 10, 1967, a Joint Meeting was held by the Board of Directors of Menominee Enterprises, Inc., and the Trustees of the Menominee Common Stock & Voting Trust at Neopit, Wisconsin. The eight Directors and seven Trustees unanimously adopted the following Resolution:

"WHEREAS, there is no other means sufficiently capable of accomplishing the economic improvement of the Menominee community except by adoption and implementation of the ERNST & ERNST REPORT; and

WHEREAS, to provide necessary tax resources for Menominee County and/or the Town of Menominee and for the relief of taxation on Menominee Enterprises, Inc. (and the residents of Menominee County, Wisconsin), and to assure continued Menominee ownership thereof;

I. BE IT RESOLVED, that Menominee Enterprises, Inc. is authorized to proceed with the recommendations of the Ernst & Ernst Report as opportunity and feasibility permit; and

II. RESOLVED FURTHER, that the Corporation is authorized to define economic development zones on its land in Menominee County, Wisconsin, not to exceed 8,750 acres in areas to be defined and described from time to time by the Menominee Common Stock & Voting Trust, and/or the shareholders of the Corporation, whichever then holds the common stock; and

III. RESOLVED FURTHER, that pursuant to Article XII of the Articles of Incorporation of Menominee Enterprises, Inc., within such economic development zones warranty deeds may issue as a form of land transfer, provided a sufficient form of quality control is a condition of such transfer, and provided always that sufficient areas of land on lakeshore be reserved for Menominee use."

18. On September 23, 1967, a meeting was held in which all Menominees who held Certificates (except minors and incompetents whose interests were voted by their special trustee, First Wisconsin Trust Co.) were invited to express their opinions on the Resolution of August 10, 1967. Of a total of 109,125 votes cast, 97,738 were for and 11,387 were against the resolution. Among the "yes" votes were 79,362 votes cast by First Wisconsin Trust Co. The referendum was announced as "advisory" and the written material distributed referred to the use of warranty deeds.

19. On July 9, 1968, Menominee Enterprises, Inc., a Wisconsin corporation, and N. E. Isaacson & Associates, Inc., also a Wisconsin corporation, entered into an Agreement whereby they established a joint venture to be known as "Lakes of the Menominees". They planned to develop and sell to persons, including non-Menominees certain lands situated in that part of the economic zone approved for development.

20. By the terms of the Agreement of July 9, 1968, the Partnership was entered into "for the purpose of holding, developing and selling the lands referred to" in the Agreement, which lands consisted of approximately 5,170 acres located within the economic development zone referred to in the Joint Resolution of August 10, 1967.

21. The Agreement of July 9, 1968, was approved unanimously by the Trustees of the Menominee Common Stock & Voting Trust.

22. Menominee Enterprises, Inc., conveyed approximately 5,170 acres of land "for the purpose of holding, developing and selling the lands referred to" in the Lakes of the Menominees Joint Venture Agreement, by means of seven Warranty Deeds, all seven of which were dated and recorded in the Office of the Register of Deeds for Menominee County, Wisconsin, prior to the commencement of this action.

23. The Agreement of July 9, 1968, was performed to a substantial degree, and in 1969 Isaacson and MEI agreed to increase the number of lots to be developed and sold from 1800 to 2600 all of them to be laid out on the land mentioned in paragraphs 21 and 22, supra.

24. On or about March 11, 1969, LOM applied for a permit to construct a third dam in the Legend Lake project.

25. On October 15, 1971, Isaacson asked MEI if it would agree to try to sell out the project in 1972 and would approve incurring additional selling costs beyond the Agreement ceiling of 30 percent. A motion was passed to refer the matter to the LOM Management Committee to act within their discretion.

26. At their January 15, 1972, meeting the LOM Land Management committee met and agreed upon a budget for 1972.

27. At the February 4, 1972, Board of Directors meeting new Director Wilber raised the question of the status of the LOM contract which states that it dissolves December 31, 1971, unless extended by the parties.

> "Mr. Dodge explained the financial advantages of a stepped-up promotional sales campaign (cost to 30 percent of projected five million in sales) which was agreeable to the Board at the October 15th meeting. The Board did not specifically "extend the contract" but turned it over to the Management Committee, who then went over the promotional budget of about $1.50 million and agreed that every effort would be made to "sell out" the remaining lots in 1972. However, the Committee waited to see if there would be any further instructions from the Board after election of new Directors on November 27th (annual Meetings) but by January 10th decided to proceed on the instructions they already had."

After a discussion, a unanimous resolution was passed to obtain a legal opinion regarding the contract.

28. At the reconvened Board of Directors meeting February 11, 1972, further discussion took place regarding the LOM contract. It was finally decided, without formal motion, that the Executive Committee would meet with Isaacson to explore the possibilities of negotiations on the contract.

29. At the February 24, 1972, Board meeting a motion to affirm the contract was withdrawn after much discussion. A motion to ask the Executive Committee to sit down with Mr. Isaacson and whomever else they wanted was unanimously passed. A motion was passed to have an ad-

visory referendum of shareholders on the LOM agreement. Estimated liquidation costs of LOM were presented to the Board by Treasurer Boyd.

30. On March 17, 1972, the Board of Directors voted in favor of continuing the LOM contract to December 31, 1972. The President of MEI thereupon confirmed the extension in writing to N. E. Isaacson and Associates, Inc., which agreed to the extension.

31. Since December 31, 1971, no action has been taken by the certificate holders or Trustees concerning land sales to non-Menominees. In April, 1972, six of the then eleven Trustees of the Menominee Common Stock & Voting Trust—none of whom was a Trustee at the time the Joint Resolution was adopted on August 10, 1967, nor at the time the Trustees approved the Agreement of July 9, 1968—signed affidavits at the request of Plaintiffs' Counsel, stating that they were opposed to land sales to non-Menominees, and that, if a vote were taken on the question, they would vote against making such sales.

32. At the time the Lis Pendens was filed herein, there existed six (6) contracts for the sale of Legend Lake properties between Lakes of the Menominees and individual third party purchasers that had not been completed and are still pending.

33. In *White, et al.* v. *Kenote, et al.* a Menominee County Circuit Court case, the trial court dealt with certain provisions of the Voting Trust and the Assistance Trust as they related to the holding of an election to determine whether the Voting Trust should be renewed pursuant to Article XII, paragraph 2 of the Voting Trust Agreement.

34. In *Lakes of the Menominees, Agnes Dick, et al.*, another Menominee County Circuit Court case, individual members of an organization called DRUMS were enjoined from picketing the business office of the Legend Lake project of Lakes of the Menominees.

35. I find that throughout the Tribal Councils and negotiating committee meetings and other negotiations as reflected in the minutes and testimony that there was clear intent held and expressed on the part of the Menominee Tribal members against the sale of any lands except as it was later amended by a referendum to provide for sales of homesites to Menominees.

36. No issue has been raised nor any evidence offered in this case attacking the good motives or good faith of any of the Parties to this action.

CONCLUSIONS OF LAW

1. Principle of *res judicata* does not apply to the instant case based on the two Menominee County Circuit Court cases, *White et al.* v. *Kenote, et al.* and *Lakes of the Menominees* v. *Agnes Dick,* because the issues as well as the parties are substantially different.

2. Voting Trust is not invalid for a failure to comply with Wisconsin law; that there was a substantial compliance with the purposes of the law.

3. Article XII of the Articles of Incorporation of Menominee Enterprises, Inc., requiring the "affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote" before the Corporation may sell land to non-Menominees is ambiguous as it relates to the period of time during which the Corporation's stock is held by the Voting Trust.

4. The seven conveyances of land made by Menominee Enterprises, Inc., to Lakes of the Menominees, a partnership, prior to the commencement of this action, were made without the necessary approval required by Article XII of the Articles of Incorporation and were an improper exercise of the Corporation's power to convey land and are, therefore, invalid.

5. The seven conveyances of land made by Menominee Enterprises, Inc., to Lakes of the Menominees, a partnership in which Menominee Enterprises held a one-half interest, did not constitute executed corporate transactions but were part of an overall joint venture for the sale of these lands, and therefore sales made subsequent to the commencement of this action and the filing of the Lis Pendens, are subject to the jurisdiction of this court.

6. The Defendants herein shall be enjoined from making any further sales of land to non-Menominees as defined in Exhibit A and B of the Complaint until further order of this Court.

7. The Defendants may carry out the terms of the six contracts for sale which were entered into by the purchasers prior to the commencement of this action and the filing of the Lis Pendens.

8. The Court will retain jurisdiction of this case for the purpose of receiving evidence and making a determination of the remaining issues herein, including in particular, issues concerning remedies.

Let judgment be entered accordingly.

Dated this 16th day of November, 1972.

BY THE COURT:

/s/ William J. Duffy

Circuit Judge

APPENDIX D

STATE OF WISCONSIN CIRCUIT COURT
MENOMINEE COUNTY
Case No. 33

HENRY L. TOMOW, SR., et al.,

Plaintiffs

VS

MENOMINEE ENTERPRISES, INC., et al.,

Defendants

INTERLOCUTORY JUDGMENT
(December 1, 1972)

The Court having made and entered its Findings of Fact and Conclusions of Law herein on November 16, 1972, and having ordered that Interlocutory Judgment be entered in accordance therewith;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, That Interlocutory Judgment be had as follows:

1. Principle of *res judicata* does not apply to the instant case based on the two Menominee County Circuit Court cases, *White et al.* v. *Kenote, et al* and *Lakes of the Menominees* v. *Agnes Dick*, because the issues as well as the parties are substantially different.

2. Voting trust is not invalid for a failure to comply with Wisconsin law in that there was a substantial compliance with the purposes of the law.

3. Article XII of the Articles of Incorporation of Menominee Enterprises, Inc., requiring the "affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote" before the Corporation may sell land to non-Menominees is ambiguous as it relates to the period of time during which the Corporation's stock his held by the Voting Trust.

4. The seven conveyances of land made by Menominee Enterprises, Inc., to Lakes of the Menominees, a partnership, prior to the commencement of this action, were made without the necessary approval required by Article XII of the Articles of Incorporation and were an improper exercise of the Corporation's power to convey land and are, therefore, invalid.

5. The seven conveyances of land made by Menominee Enterprises, Inc., to Lakes of the Menominees, a partnership in which Menominee Enterprises held a one-half interest, did not constitute executed corporate transactions but were part of an overall joint venture for the sale of these lands, and therefore sales made subsequent to the commencement of this action and the filing of the Lis Pendens, are subject to the jurisdiction of this court.

6. The Defendants herein shall be enjoined from making any further sales of land to non-Menominees as defined in Exhibit A and B of the Complaint until further order of this Court.

7. The Defendants may carry out the terms of the six contracts for sale which were entered into by the purchasers prior to the commencement of this action and the filing of the Lis Pendens.

8. This judgment shall be interlocutory and a final judgment herein shall be entered following a determination of the remaining issues in this case, including but not limited to, issues concerning remedies as to those sales which occurred prior to the injunction and subsequent to the commencement of this case and the filing of the Lis Pendens.

Dated this 1st day of December, 1972.

BY THE COURT:
/s/ *William J. Duffy*
William J. Duffy
Circuit Court Judge

APPENDIX E

Title 25, United States Code

§893. Membership roll; closure; applications for enrollment; approval or disapproval of application; appeal; finality of determination; final publication; certificates of beneficial interest

At midnight of June 17, 1954 the roll of the tribe maintained pursuant to the Act of June 15, 1934 (48 Stat. 965), as amended by the Act of July 14, 1939 (53 Stat. 1003), shall be closed and no child born thereafter shall be eligible for enrollment: *Provided*, That applicants for enrollment in the tribe shall have three months from the date the roll is closed in which to submit applications for enrollment: *Provided further*, That the tribe shall have three months thereafter in which to approve or disapprove any application for enrollment: *Provided further*, That any applicant whose application is not approved by the tribe within six months from June 17, 1954 may, within three months thereafter, file with the Secretary an appeal from the failure of the tribe to approve his application or from the disapproval of his application, as the case may be. The decision of the Secretary on such appeal shall be final and conclusive. When the Secretary has made decisions on all appeals, he shall issue and publish in the Federal Register a Proclamation of Final Closure of the roll of the tribe and the final roll of the members. Effective upon the date of such proclamation, the rights or beneficial interests of each person whose name appears on the roll shall constitute personal property and shall be evidenced by a certificate of beneficial interest which shall be issued by the tribe. Such interests shall be distributable in accordance with the laws of the State of Wisconsin. Such interests shall be

alienable only in accordance with such regulations as may be adopted by the tribe. June 17, 1954, c. 303, § 3, 68 Stat. 250.

§896. Plan for control of tribal property and service functions; termination of Federal supervision and services; approval of plan; publication in Federal Register

The tribe shall as soon as possible and in no event later than February 1, 1959, formulate and submit to the Secretary a plan for the future control of the tribal property and service functions now conducted by or under the supervision of the United States, including but not limited to services in the fields of health, education, welfare, credit, roads, and law and order, and for all other matters involved in the withdrawal of Federal supervision. The Secretary is authorized to provide such reasonable assistance as may be requested by officials of the tribe in the formulation of the plan heretofore referred to, including necessary consultations with representatives of Federal departments and agencies, officials of the State of Wisconsin and political subdivisions thereof, and members of the tribe. The Secretary shall accept such tribal plan as the basis for the conveyance of the tribal property if he finds that it will treat with reasonable equity all members on the final roll of the tribe prepared pursuant to section 893 of this title, and that it conforms to applicable Federal and State law. In the event the tribe fails to submit a plan approvable under the terms of sections 891-902 of this title by February 1, 1959, the Secretary shall cause such a plan to be prepared and submitted to the tribe within three months thereafter. The tribe shall thereafter have three months within which to accept the plan of the Secretary or to submit to the Secre-

tary tribal proposals for modification. If the Menominee Tribe and the Secretary cannot agree upon a plan within the aforementioned six-month period, or if they agree upon a plan within such period and the tribal corporation and voting trust contemplated by the plan are not established prior to March 1, 1961, the Secretary shall transfer the tribal property to a trustee of his choice for the management or disposition for the benefit of the Menominee Tribe. The responsibility of the United States to furnish all such supervision and services to the tribe and to the members thereof, because of their status as Indians, shall cease on April 30, 1961, or on such earlier date as may be agreed upon by the tribe and the Secretary. The plan shall contain provision for protection of the forest on a sustained yield basis and for the protection of the water, soil, fish and wildlife. To the extent necessary, the plan shall provide for such terms of transfer pursuant to section 897 of this title, by trust or otherwise, as shall insure the continued fulfillment of the plan. The Secretary, after approving the plan, shall cause the plan to be published in the Federal Register. The sustained yield management requirement contained in sections 891-902 of this title, and the possible selection of a trustee in the event of a tribal planning default, shall not be construed by any court to impose a financial liability on the United States. July 17, 1954, c. 303, § 7, 68 Stat. 251; July 14, 1956, c. 604, § 1, 70 Stat. 549; July 2, 1958, Pub.L. 85—488, § 1(b), 72 Stat. 290; Sept. 8, 1960, Pub.L. 86—733, § 1, 74 Stat. 867.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-760

HENRY L. TOMOW, SR., ET AL., *Petitioners,*

v.

MENOMINEE ENTERPRISES, INC., ET AL., *Respondents,*

and

N. E. ISAACSON & ASSOCIATES, INC., *Respondent.*

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE, ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.

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Attorney for Amicus Curiae

Of Counsel:
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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 42(3), the Association on American Indian Affairs, Inc., a tax-exempt organization having its principal office at 432 Park Avenue South, New York, New York 10016, by and through its undersigned attorneys, moves the Court for leave to file the attached brief *amicus curiae* in support of the Petition for Certiorari in the above-captioned case. The petitioners Henry L. Tomow, Sr., et al., and re-

spondents, Menominee Enterprises, Inc., et al., have consented to the filing of this brief; respondent, N. E. Isaacson & Associates, Inc., has refused to consent.

The Association on American Indian Affairs, Inc. is a non-profit membership corporation organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The Association is the largest Indian-interest organization in the United States, and is nationwide in scope, with a membership of 50,000 that consists of both Indians and non-Indians. The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of *amicus curiae* briefs with this Court in *Mescalero Apache Tribe* v. *Jones*, — U.S. —, 36 L.Ed. 2d 114 (1973), *Agua Caliente Band of Mission Indians* v. *County of Riverside*, 405 U.S. 933, 30 L.Ed. 2d 809 (1972), *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 31 L.Ed. 2d 741 (1972), *Puyallup Tribe* v. *Dept. of Game*, 391 U.S. 392, 20 L.Ed. 2d 689 (1968), and *Warren Trading Post Co.* v. *Arizona State Tax Comm'n.*, 380 U.S. 685, 14 L.Ed. 2d 165 (1965).

This case presents a question of great and continuing concern to the Association and to all American Indians—whether the general rule that federal statutes affecting the rights of Indian tribes must be liberally construed for their benefit and protection is applicable to legislation which, when finally implemented, provides for termination of the special relationship of a tribe to the United States. In the present case, the Association is concerned with this broad and novel issue in a specific context—namely, whether the rule of liberal construction should have been applied to the

Menominee Termination Plan, which was promulgated pursuant to the requirements of the federal act terminating the government's special relationship to the Menominee Tribe of Indians.

The Association submits the attached brief in order to assist the Court in recognizing that the decision of the Supreme Court of the State of Wisconsin contravenes the long line of precedents established by this Court which hold explicitly that a liberal rule of construction must be applied to federal statutes affecting the rights of Indian tribes. Since the foregoing point covers an important facet of the decision below which the immediate parties are not likely to emphasize, and since such discussion thus may be helpful to the Court, the Association requests that its motion for leave to file the attached brief as *amicus curiae* be granted.

Respectfully submitted,

ARTHUR LAZARUS, JR.
600 New Hampshire Avenue, N.W.
Washington, D. C.
Attorney for Amicus Curiae

Of Counsel:
W. RICHARD WEST, JR.

IN THE

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and

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BRIEF OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.

INTEREST OF AMICUS CURIAE

The Association on American Indian Affairs, Inc. is a non-profit membership corporation organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The Association is the largest Indian-interest organization in the United States, and is nationwide in scope, with a membership of 50,000 that consists of both Indians and non-Indians.

This case presents a question of great and continuing concern to the Association and to all American Indians—whether the general rule that federal statutes affecting the rights of Indian tribes must be liberally construed for their benefit and protection is applicable to legislation which, when finally implemented, provides for termination of the special relationship of a tribe to the United States. In the present case, the Association is concerned with this broad and novel issue in a specific context—namely, whether the rule of liberal construction should have been applied to the Menominee Termination Plan, which was promulgated pursuant to requirements of the federal act terminating the government's special relationship to the Menominee Tribe of Indians.[1]

The Association submits the following brief in order to assist the Court in recognizing that the decision of the Supreme Court of the State of Wisconsin contravenes the long line of precedents established by this Court which hold explicitly that a liberal rule of construction must be applied to federal statutes affecting the rights of Indian tribes.

STATEMENT OF THE CASE

On June 17, 1954 Congress enacted the Menominee Termination Act to " . . . provide for the orderly ter-

[1] Although this case involves only the Menominee Termination Act, comparable termination statutes have been enacted for a number of Indian tribes. See, *e.g.,: Act of August* 13, 1954, 25 U.S.C. 564 *et seq.* (Klamath); Act of August 23, 1954, 25 U.S.C. 721 *et seq.* (Alabama and Coushatta Indians of Texas); Act of August 27, 1954, 25 U.S.C. 677 *et seq.* (Ute); Act of August 2, 1956, 25 U.S.C. 821 *et seq.* (Peoria Tribe of Oklahoma); Act of September 21, 1959, 25 U.S.C. 931 *et seq.* (Catawba Tribe of South Carolina).

mination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin." 25 U.S.C.A. § 891 (1963). Termination became final and complete when the Secretary of the Interior promulgated a Proclamation of Termination on April 29, 1961.

Pursuant to requirements in the Menominee Termination Act, the members of the Menominee Tribe approved, in January, 1959, a Termination Plan which provided for the establishment of a tribal corporation, Menominee Enterprises, Inc. (MEI), to hold legal title to and manage the tribal assets, which consisted primarily of land originally held by the United States as trustee for the Menominee Tribe. See *Menominee Tribe of Indians* v. *United States,* 391 U.S. 404, 20 L. Ed. 2d 697 (1968). Article XII of MEI's Articles of Incorporation, which were also a part of the Termination Plan, contained the following provisions: "Unless otherwise authorized by the affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote thereon, the corporation shall have no authority to sell, exchange, assign, convey or otherwise transfer all or any portion of the real property owned by the corporation . . ."

The Termination Plan also provided for the establishment of a Voting Trust which would hold and vote the shares of stock issued by MEI, and which would be administered by seven trustees. The Board of Directors of MEI and the trustees of the Voting Trust passed a joint resolution approving a development plan which necessarily would result in the alienation to non-Menominees of land held by MEI. In

July, 1968, MEI and N. E. Isaacson, a land developer, entered into a joint venture agreement, the purpose of which was to implement the joint resolution of August, 1967. The trustees of the Voting Trust unanimously approved the joint venture agreement.

On October 25, 1971, petitioners, all of whom are members of the Menominee Tribe, filed the present action in the Circuit Court for Menominee County, Wisconsin, in an attempt to halt further sales of tribal land under the joint venture agreement to non-Menominees. Petitioners alleged, *inter alia,* that with the exception of certain sales to enrolled members of the Menominee Tribe, Article XII prohibited the sale of any land held by MEI unless such sales were authorized by an affirmative vote of two-thirds of the enrolled members of the Menominee Tribe.

The Circuit Court for Menominee County adopted petitioners' contention. As the basis for reaching its conclusion, the Circuit Court considered not only the language in the Voting Trust Agreement and the Articles of Incorporation of MEI, but also extrinsic evidence bearing on the intent of Article XII and the circumstances surrounding the consideration and approval of the Termination Plan by the Menominee Tribe.

On appeal the Supreme Court of Wisconsin rejected both the method of decision and the holding of the Circuit Court. The Supreme Court held that the trustees of the Voting Trust had the power to alienate land held by MEI, and that the provisions of Article XII were inoperative during the life of the Voting Trust. Furthermore, relying on what it considered to be an established rule of state law, the

Supreme Court reached its conclusion by considering only provisions in the Voting Trust Agreement, and made no attempt to determine the meaning attributed to Article XII by members of the Menominee Tribe at the time they approved the Termination Plan in January, 1959.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Wisconsin represents an abrupt departure from the long-established legal principle that federal statutes affecting the rights of Indian tribes must be liberally construed in their favor.[2] See *Squire* v. *Capoeman*, 351 U.S. 1, 100 L. Ed. 883 (1956); *Carpenter* v. *Shaw*, 280 U.S. 363, 74 L. Ed. 478 (1930); *Choate* v. *Trapp*, 224 U.S. 665, 56 L. Ed. 941 (1912).

In *Choate* this Court considered the question whether a tax exemption created by federal statute immunized certain lands held by members of the Choctaw and Chickasaw Tribes from taxation by the State of Oklahoma. The State urged that, pursuant to the general rule, the tax exemption should be strictly construed. This Court explicitly rejected the State's contention:

> [I]n the government's dealing with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful

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[2] This rule derives directly from a long line of cases in which a rule of identical substance has been used by this Court to interpret provisions in treaties between the United States and Indian tribes. See *Tulee* v. *Washington*, 315 U.S. 681, 86 L. Ed. 1115 (1942); *United States* v. *Shoshone Tribe*, 304 U.S. 111, 82 L. Ed. 1213 (1938); *Worcester* v. *Georgia*, 5 Pet. 515, 8 L. Ed. 492 (1832).

> expressions . . . are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years . . .

Id. at 675, 56 L. Ed. at 956.

The rule of liberal construction was emphatically affirmed in the *Carpenter* case. There the question was whether a tax exemption created by federal statute immunized from state taxation certain royalty interests in petroleum owned by members of the Choctaw Tribe. This Court held that "[w]hile, in general, tax exemptions are not to be presumed and statutes conferring them are to be strictly construed . . . the contrary is the rule to be applied to tax exemptions secured to the Indians by agreement between them and the national government . . . . Such provisions are to be liberally construed." *Carpenter* v. *Shaw,* 280 U.S. at 366-67, 74 L. Ed. at 481.

This Court again emphasized the continuing validity of the rule of liberal construction for statutes affecting Indian rights in the *Squire* case. There the question was whether proceeds from the sale by the United States of standing timber on allotted land on an Indian reservation could be made subject to the capital gains tax consistent with ". . . applicable treaty and statutory provisions and the Government's role as [a] trustee and guardian [of Indian tribes]." *Squire* v. *Capoeman,* 351 U.S. at 2, 100 L. Ed. at 887. Interpreting the relevant federal statute in light of the rule of liberal construction, this Court held that such proceeds were exempt from federal capital gains taxes.

The Wisconsin Supreme Court should have applied the same rule to Article XII.[3] Although the Articles of Incorporation of MEI are not themselves a federal law, they were formulated and approved as part of the Termination Plan which was required explicitly by Section 896, 25 U.S.C.:

> The Tribe shall as soon as possible and in no event later than February 1, 1959, *formulate and submit to the Secretary a plan for the future control of the tribal property* and service functions now conducted by or under the supervision of the United States, including but not limited to services in the fields of health, education, welfare, credit, roads, and law and order, and for all other matters involved in the withdrawal of Federal supervision. [Emphasis added.]

25 U.S.C.A. § 896 (1963). Furthermore, the Termination Plan, of which the Articles of Incorporation of MEI were such an intergral part, could not be implemented until the Secretary of the Interior approved it. Thus, the nexus between the Menominee Tribe on one hand and a federal statute and federal officials on the other is clearly a strong one.

At the time the members of the Menominee Tribe approved Article XII, they were still beneficiaries of trust property and otherwise under the protection of

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[3] Although several courts have considered cases involving Indian tribes whose relationship with the federal government had been terminated or was in the process of being terminated, no court has addressed directly the question whether the rule of liberal construction should be applied to federal termination statutes. *See Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 31 L. Ed. 2d 741 (1972); *Menominee Tribe* v. *United States*, 391 U.S. 404, 20 L. Ed. 2d 697 (1968); *Reyos* v. *United States*, 431 F. 2d 1337 (10th Cir. 1970); *Crain* v. *First National Bank of Oregon*, 324 F. 2d 532 (9 Cir. 1963).

the United States. The members of the Menominee Tribe considered the Articles of Incorporation of MEI on January 9, 10, and 17, 1959, and approved them on January 17, 1959, but termination did not become effective until April 30, 1961, when the Secretary of the Interior issued the Proclamation of Termination approving the Termination Plan and transferring the assets of the Menominee Tribe to MEI. See *Crain* v. *First National Bank of Oregon,* 324 F.2d 532 (9 Cir. 1963); *see generally Affiliated Ute Citizens* v. *United States,* 406 U.S. 128, 31 L. Ed. 2d 741 (1972).

In addition to purely legal considerations, the rationale behind the rule of liberal construction applies to petitioners' situation. The record in the present case is replete with evidence which indicates that members of the Menominee Tribe had little or no understanding of the meaning and effect of various aspects of the Termination Plan. Trial Court Record at 619, 620, 621, 623, 624, 638, 639, 640, 643, 651-52, 653, 660, 663, 675. Furthermore, evidence in the record also indicates that members of the Menominee Tribe understood Section XII to require their approval by a two-thirds vote of all land sales to non-Menominees. Trial Court Record at 633, 637, 638, 645-46, 664, 676, 699, 700. Just as much as any treaty, the underlying documents in a federally-required tribal termination program should be construed "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones* v. *Meehan,* 175 U.S. 1, 11, 44 L. Ed. 49, 54 (1899).

CONCLUSION

As entities whose relationship to the United States "resembles that of a ward to his guardian" (*Cherokee Nation* v. *Georgia,* 5 Pet. 1, 17, 8 L. Ed. 25, 31 (1831)), Indian tribes have been compelled to rely on the federal government to protect their interests. In order to insure that these interests are protected adequately, this Court has applied for over a century a rule of liberal construction to all federal statutes affecting the rights of Indian tribes. The Supreme Court of Wisconsin departed from this long line of authority by failing to apply the rule to the Menominee Termination Plan—a decision which, for the benefit and protection of all Indians similarly situate, ought to be reviewed and reversed by this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-760 and 73-772

HENRY L. TOMOW, SR., *et al., Petitioners,*

v.

MENOMINEE ENTERPRISES, INC., *et al., Respondents.*

DALY, and others, *Petitioners,*

v.

NATURAL RESOURCES BOARD, *Respondent.*

On Petitions for Writs of Certiorari to the Supreme Court of the State of Wisconsin

---

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The National Congress of American Indians, the National Tribal Chairmen's Association, and the University of New Mexico American Indian Law Center respectfully move for leave to file the attached brief amici curiae in these cases. The consent of the at-

torneys representing both sets of petitioners has been obtained. The consent of the attorneys for the Department of Natural Resources of the State of Wisconsin (respondent in *Daly* v. *Natural Resources Board*) has been obtained. The consent of the attorneys for N. E. Isaacson and Associates, Inc. (respondent in *Tomow* v. *Menominee Enterprises, Inc.*) has been requested but refused.

The interest of the National Congress of American Indians ("NCAI") arises from the fact that NCAI is a non-profit association of some 147 Indian tribes, whose purpose is to promote the interests of American Indians. NCAI is deeply concerned with the decisions of the Wisconsin Supreme Court because they represent two more examples of non-Indian interests usurping control of Indian lands and denying Indian treaty rights despite express Federal guarantees.

The National Tribal Chairmen's Association ("NTCA") is a non-profit organization of all duly-constituted chairmen, presidents, governors and chiefs of federally-recognized Indian tribes, and the presidents of the twelve Alaska regional corporations created by the Alaskan Natives Claims Settlement Act. NTCA joins as an amicus curiae because one of the purposes of NTCA, as expressed in its constitution, is to assure that treaty rights and federal privileges for the protection of the natural resources of Indian lands are fully enforced.

The University of New Mexico American Indian Law Center is an institute providing legal research and technical assistance on matters respecting Indian resources and treaty rights. The Law Center joins as an amicus curiae, believing that the retention of treaty rights by the Menominee Indians at their

termination requires that, on judicial review, a court must apply Indian law principles in order properly to interpret a provision of the Menominee Termination Plan restricting the alienation of Indian land.

The decision below of the Wisconsin Supreme Court rests upon an interpretation of the Menominee Termination Plan which ignores Federal treaties as well as long-standing congressional policies restricting non-Indians from taking Indian lands. Accordingly, the decisions establish a standard of review which would result in the impairment of Indian rights not only for the terminated Menominee and other terminated tribes, but also for federally-recognized tribes throughout the land. Amici seek to file the attached brief to advise the Court of the impact of the decisions below on Federal Indian law generally and on the many tribes, other than the Menominee, who will be adversely affected by those decisions.

Respectfully submitted,

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November, 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-760 and 73-772

HENRY L. TOMOW, SR., *et al.*, *Petitioners*,

v.

MENOMINEE ENTERPRISES, INC., *et al.*, *Respondents*.

DALY, and others, *Petitioners*,

v.

NATURAL RESOURCES BOARD, *Respondent*.

On Petitions for Writs of Certiorari to the Supreme Court of the State of Wisconsin

---

BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION, UNIVERSITY OF NEW MEXICO AMERICAN INDIAN LAW CENTER, AS AMICI CURIAE IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

INTERESTS OF AMICI CURIAE

The interests of the three amici curiae are set forth in the accompanying Motion for Leave to File Brief Amici Curiae.

STATEMENT OF THE CASES

Amici hereby adopt the statements as set forth in the two petitions.

REASONS FOR ALLOWING THE WRITS

Introduction

The basic question in these companion petitions is whether the Menominee Termination Plan reserves to tribal members the right to approve sales of tribal lands to non-Indians. Article XII of the Menominee Enterprises, Inc. ("MEI") articles of incorporation, which were part of the Termination Plan provided for in the Termination Act and approved by the Secretary of Interior, prohibits such land sales unless "authorized by the affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock . . . ." The petitioners contend, and the trial court agreed, that "holders of the shares" means the Menominee tribal members themselves, who hold certificates representing MEI shares of stock; this meaning, they contend, is apparent when the language of article XII is read in the context of the rest of the Termination Plan and when the intent of Congress, the Secretary, and the tribal members themselves is considered. The Wisconsin Supreme Court disagreed, holding that all shares are "held" by a voting trust and that the voting trust could, acting without the approval of the tribal members, transfer ancestral tribal land to non-Indians. The court below found it

unnecessary to construe the relevant language in favor of the Tribe or to analyze the intent of Congress, of the Secretary of the Interior, or of the Tribe.

We do not plan here to discuss the facts and legal principles which have been admirably presented in both petitions. We will, however, offer the judgment of amici as to the manner in which the two opinions below emasculate essential legal principles which apply to, and protect, all American Indian tribes and their members. Ultimately, as will be seen, the Wisconsin Supreme Court simply ignored Federal Indian law and congressional intent in these cases; much to the contrary, both cases demand that the starting point be basic Indian law principles. A more specific discussion follows.

This Court Should Issue a Writ of Certiorari To Correct the Wisconsin Supreme Court's Failures (1) To Apply Applicable Federal Indian Law Doctrines, (2) To Recognize Important Menominee Treaty Rights, and (3) To Review the Termination Plan in Light of the Expressed Intent of Congress, of the Secretary of the Interior, and of the Menominee Tribe.

Before termination, the Federal Government had the duty and power to manage the Menominee tribal land for the benefit of the Tribe. *See, e.g., Shoshone Tribe* v. *United States*, 299 U.S. 476, 497 (1937). This duty arose, in regard to the "Menominee", from the Wolf River Treaty of 1854, where the "Menominee" were guaranteed that their ancestral land would be "held as Indian lands are held."[1] Such treaty rights

[1] This Court implied the existence of hunting and fishing rights from the language of the Menominee Treaty establishing the reservation "for a home, to be held as Indian lands are held" by looking to the surrounding circumstances of the treaty, by construing the treaty as the Indian people would have understood it and by comparing the provisions of other treaties. *Menominee*

have historically been protected by the government. Thus, this Court has recognized that "in carrying out its treaty obligations with the Indian tribes the Government . . . has charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation* v. *United States,* 316 U.S. 286, 296-297 (1942).[2] Furthermore, in determining the scope of the treaty rights to be protected, the rights must be analyzed in terms of what was intended and understood by the Indian tribes themselves. *See, e.g., Seufert Brothers* v. *United States,* 249 U.S. 194, 198 (1919); *Tulee* v. *Washington,* 315 U.S. 681, 684-685 (1942).

In fulfilling its duty to protect Indian trust lands, Congress has imposed many restrictions on the alienation of tribal land. The Indian Non-Intercourse Act includes several provisions explicitly protecting Indian lands from acts of non-Indians and expressly makes invalid any conveyance of land from any Indian nation or tribe unless approved by congressional treaty or convention. *See* 25 U.S.C. § 177. Lands

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Tribe v. *United States,* 391 U.S. 404, 405 (1968). A similar analysis here demonstrates that the Menominee Indians reserved in the Wolf River Treaty the right to occupy and protect Indian lands from unlawful taking by non-Menominee. Indeed, this Court has ruled that for all practical purposes, a tribe receiving by treaty unrestricted possession of lands, effectively owns the lands so reserved. *United States* v. *Shoshone Tribe of Indians,* 304 U.S. 111 (1938). *See also, United States* v. *Santa Fe Pacific Railroad Co.,* 314 U.S. 339 (1941), where this Court described Indian possession of Indian lands to be "as sacred as the fee simple of whites" [314 U.S. at 345], and hence protected from unconsented taking.

[2] This Court has repeatedly recognized the federally-secured right of Indian lands to be free of unauthorized occupancy by third parties. *See, e.g., Shoshone Tribe* v. *United States,* 299 U.S. 476, 497-498 (1937); and *Buttz* v. *Northern Pacific Railroad Co.,* 119 U.S. 55 (1886).

granted to tribes by Executive Order cannot be transferred without a specific Act of Congress. *See* 25 U.S.C. § 398d. Tribes subject to the Indian Reorganization Act, as were the Menominee, are permitted to prevent the sale of tribal lands without the consent of the tribe. *See* 25 U.S.C. § 476. For other restrictions on the use of Indian land, *see, e.g.,* 25 U.S.C. §§348, 391, 392, and 393. In addition, Indian treaties have expressly prohibited access to, as well as ownership of, Indian lands by non-tribal members;[3] many later treaties included requirements for tribal consent to subsequent cessions of Indian lands.[4] Congress has imposed numerous other restrictions in furtherance of its trust duty, but there is no need to enumerate them here; the important point is that restrictions on the alienability of Indian land to non-Indians have always been a keystone of Federal Indian policy.[5]

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[3] Treaty of May 24, 1834 between United States and Chickasaw; 7 Stat. 450; Treaty of March 6, 1861 between United States and Sacs, 12 Stat. 1171; Treaty of July 2, 1791 between United States and the Cherokee Nation, 7 Stat. 39.

[4] For example, the Treaty of October 28, 1867 between the United States and the Cheyenne and Arapaho Tribes reserved to the tribes the right to refuse any cession of the reservation unless three-fourths of the adult male Indians occupying the lands consented. 15 Stat. 593. Similar treaty provisions requiring the specific consent of three-quarters of the tribal members for the disposition of tribal lands are included in the Treaty of March 2, 1886, between the United States and the Ute Indians, 15 Stat. 619, and in the Treaty of April 29, 1868, between the United States and the Sioux, 15 Stat. 635.

[5] The leading authority on Indian law has recognized that "the control by Congress of tribal lands has been one of the most fundamental expressions, if not the major expression, of the constitutional powers of Congress over Indian Affairs . . . ." COHEN, FEDERAL INDIAN LAW 94 (U.N. Mex. 1971 Ed.).

The above, then, was the nature of the trust responsibility to the Menominee before termination. The next question is the extent to which that status may have been altered by termination.

The Menominee people still exist as a tribe. *See., e.g., Menominee Tribe of Indians* v. *United States,* 388 F.2d 998, 1000-1001 (Ct. Cl. 1967), and the authorities cited there.[6] Treaty rights of the Menominee tribal members remain intact unless specifically abrogated by Congress. *Menominee Tribe* v. *United States, supra.* In addition, and importantly, Congress continues to have a "continued partial guardianship"—*exercised by means of the very termination plan squarely at issue here*—over the affairs of the Menominee Tribe. *See Otradovec* v. *First Wisconsin Trust,* 454 F.2d 1258, 1261 (7th Cir. 1972), where the Court held that the Menominee Termination Plan validly imposed restrictions on individual Menominee concerning the transfer of personal property. The Menominee termination was not limited to restrictions on individual Menominee; tribal real property and interests in the tribal corporation were also restricted by the Act itself.[7] Although not speaking in the con-

[6] This Court, of course, affirmed the Court of Claims decision in *Menominee Tribe* v. *United States,* 391 U.S. 404 (1968). The Supreme Court opinion in no way cast doubt upon the Court of Claims' reasoning as to the continued existence of the Menominee Tribe; in fact, the detailed statutory analysis by the Court of Claims is virtually unimpeachable. *See also Reed* v. *United States National Bank of Portland,* 213 F.Supp. 919, 922 (D. Ore. 1963), holding that members of the terminated Klamath Tribe remained tribal members until they affirmatively chose to withdraw.

[7] 25 U.S.C. § 896 provides that the termination plan shall provide for "future control of the tribal property" and that "the plan shall contain provision for protection of the forest on a sustained yield basis for the protection of the water, soil, fish

text of termination, this Court has also recognized Congress' right to impose restrictions on Indians after emancipation from Federal control:

> "It rests with Congress to determine the time and extent of emancipation . . . . Congress may relieve the Indians from such guardianship and control, in whole or in part, and may, if it sees fit, clothe them with full rights and responsibilities concerning their property, or give to them a partial emancipation . . . ." *United States* v. *Waller,* 243 U.S. 452, 459-460 (1917).

The ultimate question in these cases, then, is how Congress intended to protect against loss of tribal land. We know that the Termination Act, and the importance supplemental plan which is most directly involved here, were basically a congressional redefinition of the Menominee tribal rights, with close cooperation from the Tribe itself and from the Secretary of the Interior. We also know that Congress has always given its most careful consideration to the question of alienation of Indian lands. Accordingly, we think that the guiding test for this Court should be the following statement from *United States* v. *Santa Fe Pacific Railroad Co.,* 314 U.S. 339, 345 (1941):

> " 'Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian rights of occupancy, *which could only*

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and wildlife." 25 U.S.C. § 893 requires that interests in MEI "shall be alienable only in accordance with such regulations as may be adopted by the tribe." Congress was careful to assure that these protections continued for the benefit of the Tribe by requiring the Secretary of the Interior, acting in his capacity as trustee of the Menominee lands, to approve the termination plan only if he found that the plan adequately protected the interests of the Menominee tribal members and that the plan complied with Federal law. 25 U.S.C. § 896.

be interferred with or determined by the United States.'" (emphasis supplied)

The above analysis points out the crucial error made by the court below: in neither case did the court make any effort whatsoever to analyze what was "determined by the United States," by the Tribe, or by the Secretary of the Interior in regard to the nature of Menominee tribal land holdings after termination. In neither case did the court liberally construe the relevant provisions in favor of the Tribe. *See, e.g., Choate* v. *Trapp,* 224 U.S. 665 (1912). Rather, the Wisconsin Supreme Court simply analyzed—virtually in a vacuum—a single phrase in the MEI corporate articles of incorporation.

We will not here advise the Court in detail as to what was intended by Congress, by the Tribe, or by the Secretary of the Interior—the important point is that the court below simply failed to analyze such intent at all. In general, however, we are confident that the legislative history involved here, as well as the intent of the Tribe and the Secretary, will indeed show that one of the basic objects of all concerned parties was to avoid a "land grab" of Menominee land by non-Indians. 99 CONG. REC. 9746 (Aug. 24, 1953). Unfortunately, the court below treated these cases in a narrow, corporate context without recognizing that these cases involve Indian lands, Indian treaty rights, and the intent of Congress in regard to those rights. The result, of course, was approval by the Wisconsin Supreme Court of the transfer to non-Indians of ancestral Menominee land by just seven people, three of whom were non-Menominee.

The principles involved here touch upon basic rights of all Indian tribes. It is important that this Court

clarify the standards of judicial review when courts deal with the unique rights in land held by Indian tribes pursuant to Indian treaty. Time and time again, this Court has found it necessary to review the decisions of lower courts which have infringed upon Indian rights by failing to give adequate consideration to applicable Indian treaties, statutes, and congressional policies concerning Indians. For example, in four recent Indian law cases cited by this Court, certiorari was granted to review decisions of state appellate courts where the state courts' standards of review precluded the consideration of those Federal rights unique to Indian people. *See Mattz* v. *Arnett,*——— US———, 37 L.Ed. 2d 92 (1973); *McClanahan* v. *State Tax Commission,*———US———, 36 L.Ed.2d 129 (1973); *Poafpybitty* v. *Skelly Oil Co.,* 390 U.S. 365 (1968); and *Williams* v. *Lee,* 358 U.S. 217 (1959). Thus, this Court has repeatedly held that, because Federal Indian rights set Indian people apart from ordinary citizens, judicial review of matters affecting Indians must account for such rights:

> "We agree . . . that Indians are citizens and that in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens. We also agree that, to be valid, exemptions to tax law should be clearly expressed. *But we cannot agree that taxability of respondents in these circumstances is unaffected by the treaty, the trust patent or the Allotment Act.*" (emphasis supplied) *Squire* v. *Capoeman,* 351 U.S. 1, 6 (1956).

CONCLUSION

In the final analysis, standards of judicial review constitute the last barriers against the loss of Indian treaty rights and against the diminution of tribal land

bases. Beginning as long ago as Chief Justice Marshall's opinion in *Cherokee Nation* v. *Georgia,* 30 U.S. 1 (1831), this Court has sifted through almost countless treaties, statutes, and Executive Orders—many of which were broken or simply ignored—and has arrived at specific standards of judicial review which apply to the unique field of Federal Indian law.

Here, rather than following such well-established principles, the Wisconsin Supreme Court applied straight corporate law to a land transaction which threatens to cost the Menominee Tribe its ancestral heartland. Such an approach is wholly unwarranted in these cases which involve the direct products of termination, now repudiated by Congress, but once the central Federal Indian policy for the better part of two decades. In a word, these are Federal Indian law cases, not state corporate law cases.

Amici urge this Court once again to exercise the vigilance it has so often shown in protecting Indian rights and to grant certiorari to review the decisions of the Wisconsin Supreme Court.

Respectfully submitted,

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November, 1973

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In the Supreme Court of the United States

OCTOBER TERM, 1973

HENRY L. TOMOW, SR., ET AL.,

Petitioners,

vs.

MENOMINEE ENTERPRISES, INC., ET AL.,

Respondents,

and

N. E. ISAACSON & ASSOCIATES, INC.,

Respondent.

BRIEF OF RESPONDENT N. E. ISAACSON & ASSOCIATES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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N. E. ISAACSON & ASSOCIATES, INC.,

Respondent.

BRIEF OF RESPONDENT

INTRODUCTION

This Brief is submitted on behalf of the Respondent, N. E. Isaacson & Associates, Inc., in opposition to the Plaintiff's Petition for a Writ of Certiorari.

Respondent submits that the statement of facts set forth in the Petition is both incomplete and so general as to be misleading. We have, therefore, set forth a somewhat extensive statement of the facts of this case.

JURISDICTION

Respondent respectfully submits that Petitioners have failed to show jurisdiction in the United States Supreme Court under 28 U.S.C. Section 1257(3).

STATEMENT OF FACTS

General Background

By Act of June 17, 1954, Congress made provision for the "orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin."[1]

On December 12, 1957, the Official Roll of the Menominee Indian Tribe was closed in accordance with 25 U.S.C. sec. 893, and the number of Enrolled Menominees was established at 3,270.[2]

Termination of Federal supervision over the *property and members* of the Menominee Indian Tribe became effective April 30, 1961.

The Menominee Indian Tribe took its major step toward termination when the Tribe approved and adopted a comprehensive *Plan of Termination* on January 17, 1959.[3]

The Plan of Termination included, among other items, the Articles of Incorporation of Menominee Enterprises, Inc., and the Voting Trust Instrument establishing and governing the Menominee Common Stock & Voting Trust.[4]

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[1] P.L.399, c. 303, 68 Stat.250; 25 U.S.C. secs. 891-902; as amended by Acts of July 14, 1956, July 2, 1958, and September 8, 1960.

[2] Record Page 268; Pet. App. 61; U.S. Code Cong. and Adm. News, (1960), v.2, p.3467.

[3] Record Page 269; Pet. App. 62; Text of Resolution, Record Pages 937-939.

[4] Articles of Incorporation: Record Page 298; Res. App. 1-4; Voting Trust Instrument: Record Pages 302-306; Res. App. 22-23.

Menominee Enterprises, Inc.

Menominee Enterprises, Inc., is a private business, i.e., for-profit, corporation organized and existing under the laws of the State of Wisconsin.

According to its Articles, the purpose of Menominee Enterprises, Inc., "is to engage in any lawful activity" permitted by Wisconsin corporation law and, without limiting that general purpose, to "manage and operate all of the businesses and property, real and personal, transferred to the corporation by the United States of America, pursuant to Section 897, Tittle 25, U.S.C."[5]

By two deeds, both dated April 26, 1961, and both recorded September 10, 1961, in the Office of the Register of Deeds for Menominee County, Wisconsin, the United States of America conveyed to Menominee Enterprises, Inc., all of the land that, for practical purposes, previously constituted the Menominee Indian Reservation and that now constitutes Menominee County.[6]

Article XII of the Articles of Incorporation of Menominee Enterprises, Inc., contains the following provision governing the sale of land by the Corporation:

> "Unless otherwise authorized by the affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote thereon, the corporation shall have no authority to sell, exchange, assign, convey or otherwise transfer all or any portion of the real property owned by the corporation . . .

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[5] Record Page 298; Res. App. 1.

[6] Record Pages 945-952.

> provided, further, that the board of directors, or the appropriate officers at the direction of the board of directors, shall have authority to sell or to convey to individuals, who are enrolled tribal members under section 893, Title 25, U.S.C. (Final roll) or their heirs-at-law, individual parcels which in the aggregate will not exceed 14,500 acres for home sites, agricultural use or other development. . . ."[7]

Thus, with the exception of sales or conveyances to individual Enrolled Menominees, not to exceed 14,500 acres in the aggregate, Menominee Enterprises, Inc., was required to obtain the approval of the "holders" of its outstanding voting stock before land sales could be made.

Menominee Enterprises, Inc., was incorporated by a four-member Committee known as the Coordinating and Negotiating Committee.

The Committee subscribed to *all* the stock issued by the Corporation—being 327,000 shares—and the Corporation issued a single stock certificate to the Committee for these shares.

The Committee, then, transferred all the stock to the Trustees of the Menominee Common Stock & Voting Trust, to be held and voted by the Trustees under the terms of the Trust Instrument.

Finally, the Trustees issued 3,270 Trust Certificates to, or on behalf of, the 3,270 Enrolled Menominees, with each Certificate representing 100 shares of stock in Menominee Enterprises, Inc., and showing the holders' beneficial interest in such stock.

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[7] Record Page 298; Res. App. 4.

The procedural steps actually taken to organize and establish both the Corporation and the Voting Trust were more detailed than outlined above.

However, it was *stipulated,* and the Trial Court found, that each step required to be taken under the Plan of Termination for the organization and establishment of the Corporation and the Voting Trust was, in fact, taken.[8]

Menominee Common Stock & Voting Trust

The Menominee Common Stock & Voting Trust is just what its name indcates—a voting trust.

The Trust Instrument was a part of the Plan of Termination adopted and approved by the Menominee Indian Tribe as a prelude to termination.[9]

Article VII of the Articles of Incorporation of Menominee Enterprises, Inc., (also a part of the Plan of Termination) provided as follows:

> "The shareholders of the corporation may, as provided by law, create a voting trust for the purpose of conferring upon trustees the right to vote or otherwise represent their shares, by entering into a written voting trust agreement specifying the terms and conditions of the voting trust, and it is contemplated that all of the shares initially issued by the corporation shall be placed in a voting trust."[10]

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[8] Record Pages 203-204, 269-270; Pet. App. 62-63

[9] Record Pages 93, 302-306.

[10] Record Pages 298, 938; Res. App. 3.

Section 180.27(1), Wisconsin Statutes, at all times material to this action, permitted, and provided for, voting trusts as follows:

> "Any number of shareholders of a corporation may create a voting trust for the purpose of conferring upon a trustee or trustees the right to vote or otherwise represent their shares by entering into a written voting trust agreement specifying the terms and conditions of the voting trust. . . ."

The Trust Instrument conferred the following power upon the Trustees of the Menominee Common Stock & Voting Trust:

> "The Trustees, in respect of the stock held by them hereunder, are hereby vested as owners of such stock (without limitation except as herein otherwise expressly provided) with all of the rights, powers, and privileges of every kind and character of owners thereof, including without limiting the generality of the foregoing (a) the right to vote the same. . . ."[11]

It is undisputed that at all times since termination the voting stock of Menominee Enterprises, Inc., has been held in the names of, and has been voted by, the Trustees of the Menominee Common Stock & Voting Trust.

Lakes Of The Menominees

On August 10, 1967, a joint meeting was held of the Board of Directors of Menominee Enterprises, Inc., and the Trustees of the Menominee Common Stock & Voting Trust.

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[11] Record Page 303; Res. App. 26.

This joint meeting was attended by eight of the nine Directors of the Corporation and by all of the then seven Trustees of the Voting Trust.

At this joint meeting, the eight Directors and seven Trustees *unanimously* adopted the following resolution:

> "WHEREAS, there is no other means sufficiently capable of accomplishing the economic improvement of the Menominee community except by adoption and implementation of the ERNST & ERNST REPORT; and
>
> "WHEREAS, to provide necessary tax resources for Menominee County and/or the Town of Menominee and for the relief of taxation on Menominee Enterprises, Inc. (and the residents of Menominee County, Wisconsin), and to assure continued Menominee ownership thereof:
>
> "I. BE IT RESOLVED, that Menominee Enterprises, Inc. is authorized to proceed with the recommendations of the Ernst & Ernst Report as opportunity and feasibility permit; and
>
> "II. RESOLVED FURTHER, that the Corporation is authorized to define economic development zones on its land in Menominee County, Wisconsin, not to exceed 8,750 acres in areas to be defined and described from time to time by the Menominee Common Stock & Voting Trust, and/or the shareholders of the Corporation, whichever then holds the common stock; and
>
> "III. RESOLVED FURTHER, that pursuant to Article XII of the Articles of Incorporation of Menominee Enterprises, Inc. within such economic development zones warranty deeds may issue as a form of land transfer, provided a sufficient form of quality control is a condition of such transfer, and provided al-

ways that sufficient areas of land on lakeshore be reserved for Menominee use." [12]

On July 9, 1968, Menominee Enterprises, Inc., and N. E. Isaacson & Associates, Inc., entered into an agreement whereby they established what was termed a "joint venture" to be known as "Lakes Of The Menominees." [13]

By the terms of the Agreement of July 9, 1968, the joint venture was entered into "for the purpose of holding, developing and selling the lands referred to" in the Agreement. [14] The lands referred to in the Agreement consisted of 5,170 acres located within the economic development zone authorized by the above-quoted Joint Resolution of August 10, 1967. [14a]

The joint venture Agreement was contingent upon approval by the Trustees of the Menominee Common Stock & Voting Trust, which approval was given, unanimously, in July of 1968. [15]

Subsequently, between September 12, 1968, and April 5, 1971, Menominee Enterprises, Inc., as grantor, conveyed

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[12] Record Pages 271-272, 1234; Pet. App. 65-66.

[13] Record Pages 272, 702-716 (entire joint venture agreement); Pet. App. 66. The Agreement states that the parties thereto "hereby form joint venture", but it also provides that it shall be governed by the Wisconsin Uniform Partnership Act. (Record Page 716; Ch. 178, Wis. Stats.) We will conform to the terminology of the Agreement.

[14] Record Page 702.

[14a] Record Pages 1389-1390.

[15] Record Pages 205, 273, 1389-1394; Pet. App. 67.

a total of 5,170 acres of land to "Lake of the Menominees, a Partnership", as grantee. [16]

The land was conveyed by means of seven Warranty Deeds all of which were executed and recorded in the Office of the Register of Deeds for Menominee County, Wisconsin, prior to the commencement of this action. [17]

Lakes of the Menominees, then, undertook a substantial and extensive recreational land and lake development project known as "Legend Lake". The project consisted, generally, of selling recreational homesites, erecting water-level control dams, and constructing roads and recreational buildings.

Had the Legend Lake project been carried through to completion, approximately 2,700 recreational homesites would have been sold. However, the project was discontinued and the joint venture dissolved by an Agreement dated June 30, 1972. [18] By that time, approximately 2,000 lots had been sold, all projected dams had been erected, and many miles of roads had been constructed.

Present Action: Complaint—Supplemental Complaint

The present action was commenced on October 25, 1971, with the filing of a Summons, Complaint and Lis Pendens.

The original Complaint set forth two "counts." The first count was in the nature of a class action, and it was

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[16] Record Pages 273, 957-965; Pet. App. 67.

[17] Record Pages 273, 957-965; Pet. App. 67.

[18] Record Pages 1581-1604.

alleged that the Plaintiffs, approximately 162 in number, were "registered shareholders and/or holders of voting trust certificates of Menominee Enterprises, Inc.," and that they brought the action on behalf of other persons similarly situated. [19]

The second count of the original Complaint incorporated the allegations of the first count and, in addition, made the allegations necessary to make the action a shareholders' derivative action. [20]

The original Complaint named as parties defendant the two corporations that set up the joint venture—Menominee Enterprises, Inc., and N. E. Isaacson & Associates, Inc.,—together with nine of the then eleven Trustees of the Voting Trust [21] and the then Directors of Menominee Enterprises, Inc.

The first count attacked the validity of the Menominee Common Stock & Voting Trust on the ground, in short, that the Voting Trust had not been established in compliance

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[19] Record Page 19; Res. App. 5; Section 260.12, Wis. Stats.

[20] Record Page 25; Res. App. 13; Section 180.405, Wis. Stats.

[21] Article VI of the Voting Trust Instrument originally provided for seven Trustees. (Record Page 305; Res. App. 30) Seven was the required number of Trustees at all times material to the transactions between Menominee Enterprises, Inc., and N. E. Isaacson & Associates, Inc., regarding the joint venture and sales of land to non-Enrolled Menominees. The Trust Instrument was amended in November of 1970, with the required number of Trustees being increased to eleven. (Record Page 1034)

with Wisconsin law, in particular with Section 180.27(1), Wisconsin Statutes. [22]

The second count attacked the validity of sales and conveyances of land by Menominee Enterprises, Inc., to non-Enrolled Menominees, i.e., to Lakes of the Menominees and, then, by the joint venture to third parties. This attack was based on the claim that Menominee Enterprises had not obtained the requisite approval for such sales as required by Article XII of its Articles of Incorporation. [23]

Each of the two counts set forth in the original Complaint was followed by a separate prayer for relief. However, the substance of these separate prayers can be combined and summarized as follows:

(1) Declare the Menominee Common Stock & Voting Trust to be null and void;

(2) Declare the Lakes of the Menominees joint venture Agreement to be null and void;

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[22] Record Page 22; Res. App. 9. Paragraph 33 of the original Complaint provides as follows: "None of the plaintiffs nor any other MEI shareholders, to plaintiff's knowledge, have entered into a written voting trust agreement creating a voting trust for the purpose of conferring upon defendant trustees or any other trustees the right to vote or otherwise represent their shares in MEI." Cf. Section 180.27(1), Wis. Stats., quoted at Page 6 above.

[23] Record Pages 25-26; Res. App. 14. Paragraphs 55 and 56 of the Complaint provide as follows: "55. With the exception of certain limited sales of real property to enrolled Menominee tribal members, Article XII of the MEI Articles of Incorporation specifically bars the sale of corporation real property unless it is authorized by the affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote thereon. 56. No sales of MEI real property have ever been authorized by the holders of not less than two-thirds of the outstanding shares of stock entitled to vote therein (sic)."

(3) Remove the Directors of Menominee Enterprises, Inc., from office—they had been elected by the Trustees—and order a special shareholders' meeting "for the purpose of electing a new board of directors pursuant to the MEI Articles of Incorporation and the Laws of the State of Wisconsin";

(4) Set up a procedure for the exchange of Voting Trust Certificates held by the beneficial shareholders, i.e., the Enrolled Menominees, for the corporate stock held by the Trustees;

(5) Enjoin the Defendants from further carrying out the Lakes of the Menominees Agreement; and,

(6) Order the re-conveyance to Menominee Enterprises, Inc., of all lands sold to the joint venture that had not been sold to good faith purchasers prior to the commencement of this action.

Subsequent to the commencement of this action, a Supplemental Complaint was served and filed. The Supplemental Complaint purported to raise a single, new issue. It was alleged that the Lakes of the Menominees joint venture Agreement terminated on December 31, 1971, by reason of the parties thereto not having formally extended the Agreement.

The issue raised by the Supplemental Complaint is moot, since it was stipulated, and the Trial Court found, that the parties did extend the Agreement by action taken in March of 1972.[24]

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[24] Stipulation: Record Page 206; Trial Court Finding: Record Page 274; Pet. App. 69.

Trial Court's Interlocutory Judgment

On December 1, 1972, the Circuit Court for Menominee County entered its Interlocutory Judgment.[25]

The Trial Court held that the Menominee Common Stock & Voting Trust was not invalid under Section 180.27(1), Wisconsin Statutes.

However, the Trial Court held that Article XII of the Articles of Incorporation of Menominee Enterprises, Inc., was ambiguous "as it relates to the period of time during which the corporation's stock is held by the Voting Trust."[26]

The Trial Court further held that the conveyance of 5,170 acres of land by Menominee Enterprises, Inc., to Lakes of the Menominees (the joint venture) was "made without the necessary approval required by Article XII of the Articles of Incorporation" and was "an improper exercise of the Corporation's power to convey land" and was, therefore, invalid.[27]

The Trial Court, then, enjoined all Defendants "from making any further sales of land to non-Menominees" from the lands described in the Lis Pendens.[28]

From a review of the Trial Court's original Decision,[29] and that Court's Findings of Fact,[30] it is clear that the

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[25] Record Pages 279-280; Pet. App. 72-73.

[26] Record Page 279; Pet. App. 72.

[27] Record Page 279; Pet. App. 73.

[28] Record Page 280; Pet. App. 73.

[29] Record Pages 208-229; Pet. App. 36-56.

[30] Record Pages 268-275; Pet. App. 60-70.

Trial Court came to the conclusion that the approval required by Article XII of the Articles of Incorporation had to be obtained from the beneficial shareholders, i.e., the Enrolled Menominees, rather than from the Trustees of the Voting Trust.

Of course, the Corporation had obtained a unanimous vote of approval from the Trustees of the Voting Trust.

Action By The Wisconsin Supreme Court

Upon an appeal being taken to the Wisconsin Supreme Court, that Court *affirmed* the Trial Court's holding regarding the validity of the Menominee Common Stock & Voting Trust.[31]

The Wisconsin Supreme Court *reversed* the Trial Court's holdings that Article XII was ambiguous and that the Trustees of the Voting Trust were without authority to vote the corporate stock held by them for purposes of approving land sales to non-Menominees.[32]

Subsequent Proceedings

Petitioners made a timely Motion for Rehearing in the Wisconsin Supreme Court which Motion was denied on August 14, 1973.[33]

On September 7, 1973, the Trial Court, in accordance with the mandate of the Wisconsin Supreme Court, entered Final Judgment in this action dissolving the injunction, discharging the Lis Pendens, and dismissing both the Comp'aint and Supplemental Complaint on their merits.[34]

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[31] Pet. App. 14-23.

[32] Pet. App. 23-28.

[33] Pet. App. 29.

[34] Record Pages 1642-1644; Res. App. 34-36.

On September 24, 1973, upon Petitioners' Motion under 28 U.S.C. Section 2101(f), the Wisconsin Supreme Court entered an Order staying enforcement and execution of the Final Judgment, for a period of ninety (90) days, in order to permit Petitioners to seek a writ of certiorari from the United States Supreme Court.

NATURE OF ACTION

Respondent has set forth above the basic, salient facts of the instant case as disclosed by the Record.

This brings us face-to-face with the often-overlooked, and, yet, most fundamental, question of any lawsuit:

> "In the simplest terms, just what is the fight in this case all about?"

Respondent submits that the "fight" in this case consists wholly of an "internal division" among the Menominee Indians.

This "internal division" arose out of the sale of lands by Menominee Enterprises, Inc., to non-Menominees.

It is not disputed, and it cannot be denied, that the lands sold by Menominee Enterprises, Inc., were lands owned by that private, business Corporation.

The "fight" (or internal division) boils down to a single question: *Who has the authority to vote the stock in Menominee Enterprises, Inc., for the approval of the sale of lands owned by Menominee Enterprises, Inc., to non-Menominees?*

Petitioners contend that this authority resides in the holders of Voting Trust Certificates, i.e., the Enrolled Menominees who are the *beneficial* stockholders of Menominee Enterprises, Inc., for so long as the Menominee Common Stock & Voting Trust is in existence.

Respondents, both Menominees and non-Menominees, take the position that this authority resides with the Voting Trustees of the Menominee Common Stock & Voting Trust, since they are the *actual* holders of the stock in Menominee Enterprises, Inc., during the existence of the Voting Trust.

We wish to emphasize that this is what the legal fight *in this case* is all about.

Respondent, in all good faith, entered into a contractual, business relationship with Menominee Enterprises, Inc., *prior* to the time that this internal division developed.

The Voting Trustees had approved both this contractual, business relationship, *and* the sale of land by Menominee Enterprises, Inc., unanimously. Respondent relied upon, and had a right to reply upon, the good faith actions of the Voting Trustees taken in accordance with the clear and unequivocal language of the Trust Instrument.

Now, Respondent finds itself caught in the middle of the internal division among the Menominees—an internal division that developed long after the Trustees' actions had been taken and long after Respondent entered into its contract with Menominee Enterprises, Inc.

Respondent respectfully submits that if the fundamental legal issue in this case (the "fight") is kept clearly in mind, then, the United States Supreme Court will see that this is not a proper case in which to grant a writ of certiorari.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I.

THE PETITION FOR A WRIT OF CERTIORARI FAILS TO COMPLY WITH SUPREME COURT RULE 23

United States Supreme Court Rule 23.1(f) provides, in pertinent part, as follows:

> "The petition for writ of certiorari shall contain in the order here indicated—
>
> • • •
>
> "(f) If review of the judgment of a state court is sought, *the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court;* with such pertinent quotations of specific portions of the record, or summary thereof, with *specific* reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari." (Emphasis Supplied)

Respondent respectfully submits that the Petition herein wholly fails to comply with the above-quoted portion of Rule 23.

We search the Petition in vain to find any statement showing at what stage any federal question was raised in the Trial Court (the court of first instance), the manner

in which any such federal question was raised, and the manner in which the Trial Court passed on any such question.

We also search the Petition in vain to find any statement showing at what stage any federal question was raised in the Wisconsin Supreme Court (appellate court), the manner in which any such federal question was raised, and the manner in which the Wisconsin Supreme Court passed on any such question.

Respondent submits that the Petition should be denied on the ground of Petitioners' failure and apparent inability to comply with Supreme Court Rule 23.1.(f).

II.

PETITIONERS HAVE FAILED TO SHOW THE JURISDICTION OF THE UNITED STATES SUPREME COURT UNDER 28 U.S.C. 1257(3)

Petitioners invoke the jurisdiction of the United States Supreme Court under Title 28, United States Code, Section 1257(3).

That statutory provision provides as follows:

> "By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

In the instant case, it is clear that the validity "of a treaty or statute of the United States" has not been drawn in question. That is, there exists no claim or issue in this case to the effect that a treaty or statute of the United States was improperly adopted, executed or enacted, or that any such treaty or statute is in conflict with, or repugnant to, the Constitution or another treaty or statute.

It is equally clear that no statute of the State of Wisconsin is challenged in this case as being repugnant to the Constitution, treaties or laws of the United States.

The only Wisconsin statute involved in this case is Section 180.27(1) regarding voting trusts. The only issue raised concerning Section 180.27(1) was whether or not the Menominee Common Stock & Voting Trust had been set up in compliance with the statute. This is not a challenge of the statute, rather, it is a challenge of an instrument that must comply with the statute.

Therefore, if the United States Supreme Court is to have jurisdiction under 28 U.S.C. 1257(3) it must be on the ground that Petitioners "*specially set up or claimed*" some title, right, privilege or immunity under the Constitution, treaties or statutes of the United States.

Respondent respectfully submits that, at no point in the course of the instant case, have Petitioners "specially set up or claimed" any such title, right, privilege or immunity.

We propose to examine Respondent's position in two ways: First, we will look at the issues as presented to and stated by the courts below, and, second, we will examine claims made by Petitioners in their Petition in the light of the Record and the fundamental issue involved in this case.

Issues In The Courts Below

The issues raised by Petitioners in the Trial Court were stated succinctly by that Court, in its Decision of July 24, 1972, as follows:

> "Plaintiffs contend that the Voting Trust was not set up pursuant to Section 180.27, Wisconsin Statutes, which reads as follows:
>
> > 'Any number of shareholders of a corporation may create a voting trust . . . by entering into a written agreement . . .,' (Section 180.27 W.S.A., App. p. iii)
>
> "Plaintiffs also contend that the trustees did not have the power or the authority under Article XII of the Articles of Incorporation to authorize the sale of lands to non-Menominees. In the amended (sic) complaint referred to above, plaintiffs also contend that even if the LOM agreements were originally valid that due to the automatic termination of the agreement and the present make-up of the trustees there was no longer any authority for the sale of land after December 31, 1971." [35]

The above-quoted statement of the issues by the Trial Court conforms completely to the issues raised by Petitioners in their Complaint and their Supplemental Complaint prosecuted in the Trial Court.[36]

In their Brief to the Wisconsin Supreme Court, Petitioners set forth the issues (Questions Involved) as follows:

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[35] Record Pages 214-215; Pet. App. 42.

[36] Res. App. 5-16 and 17-21.

"The question presented by Plaintiffs' appeal is:

"1. Is the Menominee Common Stock & Voting Trust valid?

Answered by the Trial Court—'Yes'

"Plaintiffs believe the questions set forth by both parties Defendant concerning their appeal are more precisely stated:

"2. Do the tribal members have authority under Article XII of the MEI Articles of Incorporation to approve sales of land to non-Menominees?

Answered by the Trial Court—'Yes'

"3. Is the unsold land which was conveyed by MEI without the required approval of the tribal members to the Lakes of the Menominees partnership subject to Plaintiffs' lis pendens and an injunction prohibiting its sale?

Answered by the Trial Court—'Yes' "

An examination of Petitioners' Complaint and Supplemental Complaint, of the Trial Court's view of the issues, and of Petitioners' *own* statement of the issues before the Wisconsin Supreme Court shows clearly that Petitioners did not *specially set up or claim* any title, right, privilege or immunity under the Constitution, treaties or statutes of the United States.

In fact, the *only* right or privilege "specially set up or claimed" by Petitioners is the claimed right or privilege of *beneficial* stockholders to vote corporate stock for certain purposes, even though that corporate stock is actually held by the Trustees of a voting trust.

As the record clearly shows, however, this claim of right or privilege was not based upon a United States statute, treaty or the United States Constitution, rather, it was based solely upon Petitioners' reading and interpretation of Article XII of the Articles of Incorporation of Menominee Enterprises, Inc.

Claims Made In The Petition For A Writ Of Certiorari

At Page 12 of the Petition, we find the following statement:

> ". . . Today the contested rights concern the Menominee tribal members continuing rights under the provisions of the 1854 Treaty of Wolf River and the Menominee Termination Act and Plan *to control their tribal assets, in general, and the sale of their tribal lands to non-Menominees, in particular.*" (Emphasis Supplied)

The above-quoted statement is representative of many other, similar statements and inferences to be found throughout the Petition.

Taken at face value, such statements and inferences throughout the Petition might appear to constitute a "specially set up or claimed" title, right, privilege or immunity under the Constitution, treaties, or statutes of the United States.

Respondent most certainly intends no disrespect of Petitioners, their Counsel or the United States Supreme Court.

However, Respondent emphatically submits that the above-quoted statement, together with other similar statements and inferences contained in the Petition, (1) assume two facts that simply are not true, (2) ignore undisputed and undeniable facts contained in the Record, and (3) disregard the fundamental issue of this case that was presented by Petitioners in the first instance.

The first fact assumed by Petitioners, that simply is not true, is that this lawsuit concerns *tribal* assets and *tribal* lands. Since Termination, there have been no *tribal* assets or *tribal* lands as there were prior to Termination.

Rather, *all* assets and *all* lands are, today, *corporate* assets and *corporate* lands. *They are the assets and lands of Menominee Enterprises, Inc.*

The second fact assumed by Petitioners, that simply is not true, is that the Enrolled Menominees have lost, or have been denied, any right of control over the sale of lands owned by Menominee Enterprises, Inc., to non-Menominees.

The fallacy of this second, assumed fact is made clear by the following, undisputed and undeniable facts, contained in the Record, which Petitioners have chosen to ignore.

First, any reference to the Menominee Indian Tribe or tribal members must mean the Enrolled Menominees.

Second, the Menominee Indians approved and adopted the Plan of Termination.[37]

Third, the Plan of Termination contained the Articles of Incorporation of Menominee Enterprises, Inc., and the Trust Instrument setting up the Menominee Common Stock & Voting Trust.[38]

Fourth, both the Plan of Termination and the Termination Act provided for the conveyance and transfer of prior Reservation lands to Menominee Enterprises, Inc.

Fifth, the Enrolled Menominees are the beneficial stockholders in Menominee Enterprises, Inc., and are the holders of Voting Trust Certificates.[39]

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[37] Record Pages 269, 937-939; Pet. App. 62.

[38] Record Pages 298, 302-306, 938-939; Res. App. 1-4, 22-33.

[39] Record Page 303; Res. App. 24-25.

Sixth, as Voting Trust Certificate Holders, the Enrolled Menominees elect the Trustees of the Menominee Common Stock & Voting Trust.[40]

Seventh, originally, the Trust Instrument provided for seven Trustees "four of whom *shall* be enrolled members of the Menominee Indian Tribe."[41] This provision was amended in 1970 to increase the number of Trustees from seven to eleven *and* to provide that, thereafter, *all* Trustees shall be Menominees.[42]

Again, Petitioners would have the United States Supreme Court believe that the Enrolled Menominees have lost, or have been denied, all right or control over the sale of lands, owned by Menominee Enterprises, Inc., to non-Menominees.

The Wisconsin Supreme Court did not so hold, Petitioners did not raise such an issue below, and the undisputed and undeniable facts contradict any such assumption.

The Wisconsin Supreme Court held only that, during the existence of the Menominee Common Stock & Voting Trust, the Trustees, as the actual holders of the corporate stock, were the persons entitled to vote that stock.

This holding was based upon a reading of the Trust Instrument's plain and unequivocal language, an instrument that was adopted and approved by the Menominee Indians themselves.

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[40] Record Page 305; Res. App. 30.

[41] Record Page 305; Res. App. 30.

[42] Record Pages 1033, 1934.

Furthermore, who are these Trustees? The majority always have been Menominee Indians, all of them either are now or soon will be Menominee Indians, and they are individuals elected by the Enrolled Menominees. Furthermore, in accordance with the terms and provisions of the Trust Instrument, the Enrolled Menominees can amend the Trust and can terminate the Trust.

In short, Petitioners in their Petition choose to ignore the undisputed and undeniable facts set forth above, they choose to ignore the actual holding of the Wisconsin Supreme Court, they choose to ignore the fundamental issue of this case that they raised, and they choose to ignore the fact that they based their case upon their interpretation of one corporate instrument and upon a claim that a second instrument violated a state statute.

We respectfully submit, therefore, that when the argument in the Petition is examined in the light of the Record and those facts which Petitioners have chosen to ignore, the United States Supreme Court will see that Petitioners have not invoked properly the jurisdiction of this Court under Title 28, United States Code, Section 1257(3).

CONCLUSION

As we pointed out above, the legal "fight" in this case consists wholly of an internal division among the Menominee Indians.

This internal division developed over the question of voting the corporate stock of Menominee Enterprises, Inc., for the approval of the sale of lands owned by Menominee Enterprises, Inc., to non-Menominees.

Petitioners put this internal division into justiciable form by relying upon their interpretation of one corporate in-

strument (Articles of Incorporation) and by challenging the validity of another corporate instrument (Trust Instrument).

Two points must be emphasized. First, *both* corporate instruments, the one relied upon and the one challenged, were "state" instruments in that they were prepared and recorded in accordance with and pursuant to state statutes.

Second, the Trust Instrument was challenged on the ground that it violated a *state* statute.

Having relied, unsuccessfully, upon their interpretation of one "state" instrument, and having challenged, unsuccessfully, another "state" instrument under state law, Petitioners now seek from the United States Supreme Court a second hearing of their state questions.

Petitioners seek this second hearing on their state questions by presenting in their Petition a question (a) that was not presented in the courts below, (b) that makes no sense within the context of the present case, and (c) that disregards a clear provision of the Termination Act.

Petitioners simply did not request the courts below to apply the so-called rule of liberal construction which they present and expound upon in their Petition.

The so-called rule of liberal construction discussed by Petitioners applies "to the federal government's dealings with the Indians".

The present case simply does not concern itself with the "federal government's dealings with the Indians."

This is a case which presented challenges to and under certain corporate instruments and which challenged certain actions taken under those corporate instruments. The so-called rule of liberal construction raised by Petitioners is irrelevant to this case.

Finally, we invite the Court's attention to Title 25, United States Code, Section 899, which provides, in part, as follows:

> "When title to the property of the Tribe has been transferred, as provided in section 8 of this Act, the Secretary shall publish in the Federal Register an appropriate proclamation of that fact. Thereafter . . . *the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.*" (Emphasis added)

Petitioners, now, seek treatment by the United States Supreme Court that would be in conflict with the above-quoted provision from the Termination Act.

In asking the United States Supreme Court to take the instant case, Petitioners are asking that the "laws of the several states", i.e., the laws of the State of Wisconsin, not be applied to them in the same manner as those laws are applied to all other Wisconsin citizens. Such favored treatment, in the instant case, would clearly violate the Termination Act.

In conclusion, we submit that this is a case arising wholly out of an internal division among the Menominee Indians. That internal division revolves around legal instruments and legal entities that were, necessarily, prepared and established under and in accordance with the laws of the State of Wisconsin. Petitioners have raised no Federal challenges to the applicable state laws, such as would confer jurisdiction on the United States Supreme Court.

Respectfully submitted,

VANCE M. WAGGONER II
Attorneys for Respondent,
N. E. Isaacson & Associates, Inc.

APPENDIX

APPENDIX A

ARTICLES OF INCORPORATION OF MENOMINEE ENTERPRISES, INC.

The undersigned individuals, who are the members of the Coordinating and Negotiating Committee of the Menominee Indian Tribe, for the purpose of forming a Wisconsin corporation under Chapter 180 of the Wisconsin Statutes, do hereby adopt the following Articles of Incorporation:

ARTICLE I—NAME

The name of the corporation is Menominee Enterprises, Inc.

ARTICLE II—PURPOSE

The purpose for which this corporation is organized is to engage in any lawful activity within the purposes for which corporations may be organized under the Wisconsin Business Corporation Law. Without limiting in any way the generality of the foregoing, the corporation shall manage and operate all of the businesses and property, real and personal, transferred to the corporation by the United States of America, pursuant to section 897, Title 25, U.S.C.

ARTICLE III—AUTHORIZED CAPITAL

The total number of shares which the corporation shall have authority to issue is 330,000, consisting of one class only, designated as common stock of the par value of One Dollar ($1.00) per share. The corporation and/or its share-

holders shall have the right by amendment to these Articles by affirmative vote of the holders of not less than two-thirds of its outstanding shares entitled to vote, to prohibit or restrict, subject to such terms and conditions it or they may see fit, the right of any holder of common stock to sell or otherwise dispose of his shares of common stock without first offering the same to the corporation or its nominees, or giving the corporation or its nominees an option to reacquire the stock from a transferee.

ARTICLE IV—AUTHORITY TO PURCHASE SHARES

Subject to the provisions of section 180.385(1) (a) and (b), the corporation is authorized to purchase shares of its own stock or voting trust certificates issued in exchange for such shares, without vote of the shareholders and without regard to the availability of unreserved and unrestricted earned surplus equal to the cost of such shares. Preemptive rights shall attach to the sale of treasury shares, except that an amount of treasury shares not in excess of 6 percent of issued and outstanding shares may be set aside by the board of directors for insurance under an employee stock ownership plan.

ARTICLE V—DIRECTORS

The business and affairs of the corporation shall be managed by its board of directors, which shall consist of nine (9) directors. At the first annual meeting of shareholders, the nine directors elected shall be divided into three classes, to consist of three directors in each class, the term of office of directors of the first class to expire at the first annual meeting of shareholders after their election, that of the second class to expire at the second annual meeting after their election, and that of the third class to

expire at the third annual meeting after their election. A total of four directors, including at least one member of each class, shall be members of the Menominee Indian Tribe of Wisconsin, whose names appear on "Final Roll—Menominee Indian Tribe of Wisconsin" as proclaimed by the Secretary of Interior of November 26, 1957, and published at pages 9951-9972, FEDERAL REGISTER, December 12, 1957, or blood descendants of such members, and such directors shall be designated "Tribal Directors". At each annual meeting subsequent to the first annual meeting three directors shall be elected to hold office for three years, except when elected by the shareholders to fill the unexpired term of their predecessors. No person shall be eligible to serve as a director of the corporation at the same time he is a trustee under any voting trust entered into by shareholders of the corporation, pursuant to article VII of these Articles of Incorporation. Directors need not be residents of the State of Wisconsin. Any vacancy occurring in the Board of Directors shall be filled until the next succeeding annual election of directors by the affirmative vote of a majority of the directors then in office although less than a quorum.

The initial directors who shall serve until the first annual meeting of shareholders, shall be as follows:

_____	_____	_____
_____	_____	_____
_____	_____	_____

No person who is a member of the county board of Menominee County or of the town board of any town or supervisor of any village in such county shall be eligible to be a director.

ARTICLE VI—QUORUM OF SHAREHOLDERS

One-third of the outstanding shares of the corporation entitled to vote, represented in person or by proxy, shall constitute a quorum at any meeting of shareholders.

ARTICLE VII—VOTING TRUST

The shareholders of the corporation may, as provided by law, create a voting trust for the purpose of conferring upon trustees the right to vote or otherwise represent their shares, by entering into a written voting trust agreement specifying the terms and conditions of the voting trust, and it is contemplated that all of the shares initially issued by the corporation shall be placed in a voting trust.

ARTICLE VIII—OPERATION OF FOREST ON SUSTAINED-YIELD BASIS

In accordance with the requirements of section 896, Title 25, U.S.C., the forest lands classified as such by the United States pursuant to §143.50 of Title 25, CFR, when transferred by the United States of America to the corporation, shall be operated by the corporation and any assignee or successor in interest on a sustained-yield basis, consistent with sound forestry practice; provided, however, that the Board of Directors may from time to time determine by resolution what lands shall be designated forest land, or removed from such designation not inconsistent with law, and shall record such resolution or resolutions with the register of deeds for the county or counties in which such lands are located. Notwithstanding the provisions of Article X or any other article dealing with amendments to these articles, or any other provisions of law, this article may not

be amended by the shareholders to delete the requirement that forest lands shall be operated on a sustained-yield basis consistent with sound forestry practice unless expressly permitted by the Congress of the United States of America.

ARTICLE IX—REGISTERED OFFICE AND AGENT

The address of the initial registered office of the corporation is Neopit, Wisconsin, and the name of the initial registered agent at such address is .....

ARTICLE X—AMENDMENT

These articles may be amended by an affirmative vote of the holders of at least two-thirds of the shares entitled to vote thereon at any regular meeting of shareholders, or special meeting of shareholders called for that purpose.

ARTICLE XI—INCORPORATORS

The names and addresses of the incorporators are:

George W. Kenote, Keshena, Wis.
Gordon Dickie, Keshena, Wis.
Mitchell A. Dodge, Keshena, Wis.
Jerome Grignon, Keshena, Wis.

ARTICLE XII—SALE OF LAND

Unless otherwise authorized by the affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote thereon, the corporation shall have no authority to sell, exchange, assign, convey or otherwise transfer all or any portion of the real property owned by the corporation; provided, however, that the board of directors, or the appropriate officers at the

direction of the board of directors, may mortgage or pledge corporation assets, for such borrowing purposes as it shall deem necessary and advisable, in an amount not exceeding $250,000; and, provided, further, that the board of directors or the appropriate officers at the direction of the board of directors shall have authority to lease real property other than lands designated as forest lands; and, provided, further, that the board of directors, or the appropriate officers at the direction of the board of directors, shall have authority to sell or to convey to individuals, who were enrolled tribal members under section 893, Title 25, U.S.C. (final roll) or their heirs-at-law, individual parcels which in the aggregate will not exceed 14,500 acres for home sites, agricultural use or other development, which lands shall be zoned for that purpose and shall not include lands designated as forest lands.

Executed in duplicate this ..... day of ....., 196.....

GEORGE W. KENOTE,
GORDON DICKIE,
MITCHELL A. DODGE,
JEROME GRIGNON.

APPENDIX B

COMPLAINT
(Record Pages 129-141; Formal Parts Omitted)

Now come the Plaintiffs above-named, by Joseph F. Preloznik, their attorney, and for a complaint against the defendants above-named, allege:

FIRST COUNT

1. Plaintiffs are all adult residents of the State of Wisconsin and either are now or were at the time of the transactions or any part thereof of which they complain, registered shareholders and/or holders of voting trust certificates of Menominee Enterprises, Inc., and bring this action on their own behalf and on behalf of all other shareholders of said corporation similarly situated; the questions raised herein being of common interest of all shareholders and holders of trust certificates and the said holders being so numerous that it is impractical to bring them all before the court.

2. Defendant Menominee Enterprises, Inc., hereinafter sometimes referred to as "MEI", is a corporation organized and doing business under Chapter 180 of the laws of the State of Wisconsin with its principal place of business and general offices at Neopit, Wisconsin.

3. Defendant George Kenote is an adult residing at Keshena, Wisconsin, whose occupation is that of a part-time real estate salesman.

4. Defendant Hilary J. Waukau, Sr., is an adult male resident of Neopit, Menominee County, Wisconsin, who is employed by Menominee Enterprises, Inc., a Wisconsin business corporation.

5. Defendant W. Don Knight is an adult male resident of Madison, Dane County, Wisconsin, residing therein at 4514 Keating Terrace, whose occupation is that of professor.

6. Defendant Delores Boyd is an adult female resident of Neopit, Menominee County, Wisconsin, whose occupation is that of director of Menominee County Child Development Center.

7. Defendant Lucille B. Chapman is an adult female resident of Keshena, Menominee County, Wisconsin, whose occupation is unknown to plaintiffs.

8. Defendant William R. Moser is an adult male resident of South Milwaukee, Milwaukee County, Wisconsin, residing therein at 1410 Lake Drive, whose occupation is that of circuit judge.

9. Defendant Andre LeMay is an adult male resident of Keshena, Menominee County, Wisconsin, whose occupation is that of plumbing contractor.

10. Defendant Roger J. Grignon is an adult male resident of Shawano, Shawano County, Wisconsin, residing therein at 1111 North Smallery Street, whose occupation is unknown to plaintiffs.

11. Defendant Earl R. Westcott is an adult male resident of Keshena, Menominee County, Wisconsin, whose occupation is unknown to plaintiffs.

12. The defendants named in paragraphs 3 through paragraph 11 above are trustees of the so-called Menominee Common Stock and Voting Trust (hereinafter called the "Voting Trust") and constitute 9 of the 11 trustees of the said Voting Trust, and have been sued in their capacities as trustees.

13. Defendant Georgianna W. Ignace is an adult female resident of Milwaukee, Milwaukee County, Wisconsin, residing therein at 1527 Carriage Lane, whose occupation is housewife.

14. Defendant Ada Deer is an adult female resident of Madison, Wisconsin, residing therein at 2231 Woodview Ct., Apt. 29, who is a law student.

15. The defendants named in paragraphs 13 and 14 above are recently elected Trustees of the Voting Trust. They did not participate in, approve, or in any way ratify the transactions complained of herein, and they are joined as defendants in order that they may be subject to the jurisdiction of the court and be bound by any orders or judgments made.

16. Defendant Joseph E. Frechette is an adult male resident of Neopit, Menominee County, Wisconsin, and is president and a director of MEI.

17. Defendant Theodore S. Boyd is an adult male resident of Neopit, Menominee County, Wisconsin, and is a vice-president and a director of MEI.

18. Defendant Myron W. Grignon, Sr., is an adult male resident of Neopit, Menominee County, Wisconsin, and is secretary of MEI.

19. Defendant Raymond W. Dickinson is an adult male resident of Shawano, Shawano County, Wisconsin, residing therein at Route 1, his occupation is unknown to plaintiffs, and he is a director of MEI.

20. Defendant Gordon A. Bubolz is an adult male resident of Appleton, Outagamie County, Wisconsin, residing therein at 1001 W. Foster Street; his occupation is that of lawyer, and he is a director of MEI.

21. Defendant Richard R. Dodge is an adult male resident of Escanaba, Michigan, residing at 507 South 11th Street; his occupation is unknown to plaintiffs, and he is a director of MEI.

22. Defendant William Fredenburg is an adult male resident of Green Bay, Brown County, Wisconsin, residing at 735 North Jefferson; his occupation is unknown to plaintiffs, and he is a director of MEI.

23. Defendant Bernard Kaquatosh is an adult male resident of Stevens Point, Portage County, Wisconsin, residing at 1820 Michigan Avenue; his occupation is that of logging contractor and he is a director of MEI.

24. Defendant Harry W. Harder is an adult male resident of Keshena, Menominee County, Wisconsin; he is retired and he is a director of MEI.

25. Defendant Gordon Dickie is an adult male resident of Neopit, Menominee County, Wisconsin; his occupation is unknown to plaintiffs, and he is a director of MEI.

26. Defendant Edward G. Vigue is an adult male resident of South Bend, Indiana, residing at 1217 South 35th Street; his occupation is unknown to plaintiffs, and he is a director of MEI.

27. Defendant Leo A. Seefeldt is an adult male resident of Neopit, Menominee County, Wisconsin; he is Acting President of MEI.

28. Defendant Letitia Caldwell is an adult female resident of Neopit, Menominee, Wisconsin, and is Assistant Treasurer of MEI.

29. Defendant Atlee A. Dodge is an adult male resident of Keshena, Menominee County, Wisconsin; his occupation is that of Vice President in charge of Resources and Business for MEI, and he is a director of MEI.

30. Defendant Lawrence R. Johnson is an adult male resident of Shawano, Shawano County, Wisconsin, residing therein at 246 Lake Drive; his occupation is unknown to plaintiffs, and he is a director of MEI.

31. Defendants named in paragraphs 16 through 30 are sued herein in their capacities as directors and officers of MEI.

32. N. E. Isaacson and Associates, Inc., (hereinafter sometime referred to as "Isaacson") is a corporation organized and existing under the laws of the State of Wisconsin, with its principal place of business and general office at Reedsburg, Wisconsin.

33. None of the plaintiffs nor any other MEI shareholders, to plaintiff's knowledge, have entered into a written voting trust agreement creating a voting trust for the purpose of conferring upon defendant trustees or any other trustees the right to vote or otherwise represent their shares in MEI.

34. Defendants MEI, directors, and officers wrongfully and without proper authority deposited plaintiffs and other shareholders' stock certificate with defendant trustees.

35. Defendant trustees acting without proper authority have taken it upon themselves, under color of the so-called "Menominee Common Stock Voting Trust" which plaintiffs and other shareholders have not agreed to or signed, to hold said stock certificate and to deliver to plaintiffs and other shareholders mere certificates of trust.

36. Defendant trustees are and have been unlawfully exercising the voting rights of plaintiffs and other shareholders in that they have elected the defendant directors as directors of MEI, and, excepting Trustees Ignace and

Deer, they have participated in, approved and/or ratified a decision of the defendant directors to sell MEI land to non-enrolled Menominee tribal members (hereinafter referred to as "non-Indians") in violation of the Articles of Incorporation, and in usurpation of plaintiffs' rights.

37. Pursuant to the trustees' approval, defendant directors and defendant officers have entered into and are carrying out an agreement with defendant Isaacson whereby they purported to bind MEI to a joint venture with defendant Isaacson under the name "Lake of the Menominees;" said venture involving the sale of certain MEI real property they labeled "Legend Lake" to non-Indians.

38. Under that agreement, defendants MEI, directors and officers transferred title to Legend Lake property to "Lake of the Menominees," and entered into an agreement giving officers of Isaacson power to execute all conveyances of said property.

39. Vast quantities of said land have been sold to non-Indians. To the best of plaintiffs' knowledge, that part of the Legend Lake property not yet sold consists of portions of the real property conveyed to Lake of the Menominee by Documents Nos. 1522, 2370, 3783, 2381, 2414, 3281, and 5099, in Records of the Register of Deed, Menominee County, Wisconsin, which lands are fully described in Exhibit A attached hereto and hereby incorporated herein and made a part hereof, with the same force and effect as if set forth herein.

40. On information and belief, plaintiffs allege that defendant directors and officers have in the past and may in the future sell other corporation real property unknown to plaintiffs and, as other lands not in the Legend Lake development come on the market, said defendants are

executing and will continue to execute waivers of the corporation's right to repurchase that land; said real property being part of the land situated in the County of Menominee, State of Wisconsin, and conveyed to MEI in deeds recorded as Documents Nos. 10 and 11, on the 1st day of September, 1961 in Volume of Records, pages 15 and 19, respectively, and more particularly described in Exhibit B attached hereto and hereby incorporated herein and made a part hereof, with the same force and effect as if set forth herein.

WHEREFORE, plaintiffs demand judgment as follows:

1. A declaration that the so-called "Menominee Common Stock and Voting Trust" is null and void;

2. An order permanently enjoining defendants Kenote, R. Grignon, Ignace, Deer, Wescott, Waukau, Knight, D. Boyd, Chapman, Moser, and Lemay, and each of them, from attempting to exercise in any way the rights of plaintiffs and other MEI shareholders; and

3. An order setting up a procedure for the exchange of plaintiffs and other shareholders' trust certificates for stock certificates representing their respective shares in MEI;

4. A declaration that defendant directors were not properly elected to the Board of Directors of MEI; that they had and have no authority to dispose of the assets of the corporation and that any agreements involving the sale of corporate real property, including that with N. E. Isaacson & Associates, Inc., dated on or about July 9, 1968, are null and void and unenforceable, *except as to the rights of prior good faith purchasers;*

5. A declaration that the Agreement dated July 9, 1968, by which the then President and Secretary of MEI gave N. E. Isaacson and Ralph Voss of N. E. Isaacson & As-

sociates, Inc., power of attorney to execute all deeds of conveyance from Lake of the Menominees to any purchaser is null and void; said Agreement being Document No. 1534 filed for record on October 21, 1968;

6. An order that a special shareholders' meeting be called for the purpose of electing a new Board of Directors pursuant to the MEI Articles of Incorporation and the laws of the State of Wisconsin; and pending said meeting, an order restraining said directors and officers from disposing of any assets of the corporation or any interests therein;

7. An order requiring Defendants MEI and Isaacson to reconvey to MEI all properties formerly transferred to Lake of the Menominees which had not been conveyed to a good faith purchaser at the time said defendants learned of this proposed lawsuit or at the time of filing the said action whichever is earlier.

SECOND COUNT

50. Plaintiffs incorporate herein and make a part hereof, with the same force and effect as if re-alleged herein, all allegations contained in their first count.

5. Plaintiffs are and were either registered shareholders and/or holders of voting trust certificates at the time of the transactions or any part thereof of which they complain, or their shares or voting certificates thereafter devolved upon them by operation of law from a holder who was a holder at the time of the transaction or any part thereof of which they complain; and plaintiffs bring this action in the right of MEI, being holders of not less than three (3%) per cent of any class of MEI shares issued and outstanding.

52. Plaintiffs have delivered to the corporation and the board of directors a copy of this complaint, asking them to indicate within 5 days whether or not they will take the action requested herein, stating its purpose so to file this complaint if an affirmative reply is not received.

53. Plaintiffs have not taken further efforts to secure from the defendant directors such action, because all the present directors participated in, approved of and/or were the beneficiaries of the wrongful acts and conduct herein alleged and are themselves named as defendants herein; and any further demand upon the corporation to bring action to redress the wrongs herein would, in effect have required its board of directors to institute suit against themselves and members of the Menominee Common Stock and Voting Trust who participated in and approved the said wrongful acts and would have been futile.

54. Acting as directors and officers of MEI, defendants directors and officers have been and are continuing to conduct the affairs of the corporation and to deal with corporate assets.

55. With the exception of certain limited sales of real property to enrolled Menominee tribal members, Article XII of the MEI Articles of Incorporation specifically bars the sale of corporation real property unless it is authorized by the affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote thereon.

56. No sales of MEI real property have ever been authorized by the holders of not less than two-thirds of the outstanding shares of stock entitled to vote therein.

57. Nevertheless the defendants directors and officers have purported to so sell MEI real property and continue to do so as set forth more particularly in paragraphs 37 and 40 of the first count.

WHEREFORE, plaintiff demands judgment as follows:

1. That defendants T. Boyd, Bubolz, Dickie, Dickinson, A. Dodge, R. Dodge, Frechette, Fredenberg, Harder, Johnson, Kequatosh, Vigue, Seefeldt, M. Grignon, and Caldwell be removed as directors and officers of MEI and a special shareholders' meeting be called for the purpose of electing a new board of Directors pursuant to the MEI Articles of Incorporation and the Laws of the State of Wisconsin;

2. That the contract and/or agreement entered into between defendants directors and officers and Isaacson, dated on or about July 9, 1968 is null and void, and should be cancelled and rescinded;

3. That defendants directors and officers and each of them account for their acts as directors, officers, and fiduciaries of MEI and that they be directed to pay over to the court any and all sums of money and any and all assets accounted for;

4. That defendants directors and officers and each of them be adjudged and decreed jointly and severally to be constructive trustees of any and all money, funds, assets, facilities, properties received and acquired by them as a result of acts committed against the laws of the State of Wisconsin and/or in breach of fiduciary obligations owing to MEI;

5. That defendants directors and officers account to plaintiffs, for their acts and conduct herein complained of, and that they be directed to pay over to MEI, all losses and damages occasioned by their acts and conduct, and all profits or/gains received by them in their said acts and conduct.

6. That defendants directors and officers be enjoined and restrained from in any way whatsoever honoring its contract with Isaacson.

7. Plaintiffs have such other and further relief as may be just and proper, with costs and disbursements of this action, including the fair and reasonable allowance of counsel fees and any other lawful expenses in connection with the prosecution of this action.

/s/ *Joseph F. Preloznik*
JOSEPH F. PRELOZNIK
Attorney for Plaintiffs
WISCONSIN JUDICARE
520 University Avenue
Madison, Wisconsin 53703

APPENDIX C

SUPPLEMENTAL COMPLAINT
(Record Pages 164-168; Formal Parts Omitted)

Come now plaintiffs, by their attorneys, and by leave of court and for their supplemental complaint, state as follows:

1. Plaintiffs incorporate herein and make a part hereof with the same force and effect as if re-alleged herein, all allegations contained in their complaint filed in October, 1971.

2. On November 27, 1971, two new trustees were elected. They were new defendant Carol Dodge, an adult residing at 3200 Water Street, #29A, Stevens Point, Wisconsin, who is a student, and plaintiff John Gauthier.

3. In December, 1971, the following new directors were elected to MEI:

(1) Plaintiff Sylvia Wilber.

(2) Plaintiff Lloyd Powless.

(3) Gordon Keshena, an adult residing in Milwaukee, Wisconsin, whose address is c/o Inland Ryerson Construction Products Co., Box 393, who is in the construction business.

(4) New defendant Robert Deer, an adult, residing at 914 Edgewater Court, Madison, Wisconsin, who is a student.

4. New defendants Carol Dodge, Gordon Keshena, and Robert Deer, did not participate in, approve, or in any way ratify the transactions complained of in the complaint or

this supplemental complaint and they are joined as defendants in order that they may be subject to the jurisdiction of the court and be bound by any orders or judgment made.

5. Paragraph 17 of the joint venture agreement between defendant MEI and defendant Isaacson mentioned in Paragraph 37 of the Complaint reads as follows:

> "*17. (a) The joint venture will be dissolved at the close of the calendar year 1971, unless such term is shortened or extended by agreement of the parties.* Upon dissolution of the joint venture for any reason, the liabilities of the joint venture shall be discharged, the net income or loss to date of dissolution, shall be credited or debited, as the case may be, to the capital accounts of the parties, and the assets of the joint venture then remaining shall be distributed as follows:
>
> (1) Two Hundred Thousand Dollars ($200,000.00) shall be distributed first to Enterprises.
>
> (2) Two Hundred Thousand Dollars ($200,000.00) shall be distributed to Isaacson.
>
> (3) The balance, if any, shall be distributed in proportion to capital accounts of Enterprises and Isaacson. (Emphasis added)
>
> (b) Any land, buildings and developments held by the joint venture upon dissolution, shall, upon the election of Enterprises, be transferred to Enterprises as its share of the dissolution distribution as provided herein. Such land, buildings and developments shall be valued at the book value thereof, less any liens or encumbrances to which they are subject. In the event such net book value of land owned by the joint venture

upon dissolution exceeds the amount of the capital account of Enterprises, Enterprises shall have the option to pay the amount of such excess to the joint venture and receive all of such land."

6. The parties to said joint venture agreement did not extend the agreement.

7. If the defendant MEI and defendant directors wished to enter into another agreement which involved the sale of land to non-Menominees, they were required to follow the dictates of Article XII of the MEI Articles of Incorporation. The pertinent part of that section states:

"Unless otherwise authorized by the affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote thereon, the corporation shall have no authority to sell, exchange, assign, convey or otherwise transfer all or any portion of the real property owned by the corporation: . . ."

8. Plaintiffs assert that Article XII requires a two-thirds vote of the enrolled Menominees and defendants, except defendants Ada Deer, Georgianna Ignace, Robert Deer, and Carol Dodge, assert that this article requires only a two-thirds vote of the eleven trustees of the Menominees Common Stock and Voting Trust.

9. Since termination of the joint venture agreement, neither two-thirds of the enrolled Menominees nor two-thirds of the Trustees have authorized new sales to non-Menominees. At the present time, the defendants MEI and Isaacson could not obtain a two-thirds vote of authorization from the trustees, as evidenced by the attached affidavits, marked as Exhibits 1-6.

10. Despite this failure to receive proper authorization, MEI and Isaacson have begun once more to sell MEI land to non-enrolled Menominees and threaten to continue doing so, which action is and will cause irreparable harm to defendants.

11. Upon information and belief, defendant MEI, acting through and with the approval of its directors, except new directors Wilber, Keshena, Robert Deer, and Lloyd Powless, has co-signed the mortgages and mortgage notes of those who have bought MEI real property since the filing of this action.

12. Upon information and belief, MEI, acting through and with the approval of its directors, except new directors Wilber, Keshena, Robert Deer, and Powless, is not holding the proceeds of said sales in reserve in case it becomes necessary for the corporation to pay off the mortgages.

WHEREFORE, in addition to the relief sought in their complaint, plaintiffs pray the court to declare the joint venture contract between defendants MEI and Isaacson to be dissolved and terminated, to permanently enjoin the sale, conveyance or transfer of any interest in any real property to non-Menominees under the color of said contract, and pending a final determination of this matter, to enjoin said defendants from entering into said transaction.

Joseph F. Preloznik
Warren A. Kenney
WISCONSIN JUDICARE
Ruth S. Downs
WISCONSIN INDIAN LEGAL SERVICES
Attorneys for Plaintiffs
520 University Avenue
Madison, Wisconsin 53703

APPENDIX D

MENOMINEE COMMON STOCK & VOTING TRUST
(Record Pages 302-306)

Menominee Common Stock and
Voting Trust

This Agreement, entered into as of the ..... day of ....., 19,...., between George W. Kenote, Gordon Dickie, Mitchell A. Dodge, and James G. Frechette, who constitute the Coordinating and Negotiating Committee of the Menominee Indian Tribe, acting on behalf of all the duly enrolled tribal members thereof (hereinafter called "Depositors"), and

....,
....,
....,

and ....., and their successors, as Trustees (hereinafter called the "Trustees") and Menominee Enterprises, Inc., a Wisconsin corporation (hereinafter called the "Company").

WITNESSETH

Whereas, the Depositors are the holders on behalf of enrolled members of the Menominee Indian Tribe and their lawful distributees, of the Certificate of Beneficial Interest issued by the Menominee Indian Tribe pursuant to section 893, Title 25, U.S.C. which Certificate is to be cancelled by the Depositors in accordance with the terms and provisions of the "Plan for the Future Control of Menominee Indian Tribal Property and Future Functions (hereinafter called "Plan"); and

Whereas, the Plan provides for the issuance to Depositors by the Company of 327,000 shares of One Dollar ($1.00) par value common stock of the Company, which Company has been formed pursuant to sections 896, and 897, Title 25, U.S.C. to take title to part of the tribal lands, assets, enterprises, business and property, real and personal, legally or beneficially owned by the Menominee Indian Tribe of Wisconsin, and for the deposit of such shares of stock in a Menominee Common Stock and Voting Trust in exchange for the issuance of voting trust certificates; and

Whereas, said 327,000 shares of stock have been issued to Depositors and the Depositors contemporaneously with the execution of this Agreement will transfer said 327,000 shares of stock to Trustees, and Trustees will issue voting trust certificates evidencing beneficial interests in this Trust to enrolled members of the Menominee Indian Tribe of Wisconsin (defined as those names which appear on "Final Roll—Menominee Indian Tribe of Wisconsin" as proclaimed by the Secretary of Interior November 26, 1957 and published at pages 9951-9972, FEDERAL REGISTER, December 12, 1957) or to the heirs or lawful transferees of deceased enrolled members, or to the Trustees of the Trust created by or at the direction of the Secretary of Interior of the United States of America for the benefit of minor and certain other members of the Menominee Indian Tribe; and

Whereas, the Plan which is the basis for the conveyance of the tribal property provides for the creation of this Trust, which is advisable and for the best interests of the members of the Menominee Indian Tribe and their lawful distributees, and is necessary in order to insure stability

of control, development of the policies and management of the Company, and to protect the collective interests in the Company.

Now, therefore, in consideration of the agreement and undertakings hereinafter made by the Trustees and other valuable consideration, the receipt of which is hereby acknowledged, the Depositors do hereby assign, transfer and set over unto the Trustees, and their successors, 327,000 shares of common stock of the Company, evidenced by Certificate No. ....., and the Trustees do hereby acknowledge that said stock has been assigned, transferred and set over to them, and they do hereby covenant and agree that they have received and will hold said stock, and such additional common stock or other securities of the Company as may hereafter be transferred, assigned and set over unto them as hereinafter provided, in trust (to be held, used, transferred and disposed of by them), for the following uses and purposes, and upon the following terms and conditions:

I. Deposit of Stock

1. The Depositors hereby sell, assign, and transfer to the Trustees and their successors, the full legal title to 327,000 shares of common stock of Menominee Enterprises, Inc., and agree that the Trustees and their successors shall have and be vested with all of the rights and powers of the owner and holder of such stock, with full rights and powers of whatever nature necessary to enable the Trustees to exercise the powers vested in them under this agreement.

2. In exchange for the stock transferred by Depositors to Trustees, the Trustees shall issue voting trust certificates (herein called "Trust Certificates"), to the enrolled

members of the Menominee Indian Tribe or to the heirs or lawful transferees of deceased enrolled members, or to the Trustees of the Trust created by or at the direction of the Secretary of Interior for the benefit of certain members of the Menominee Indian Tribe, all as designated in a Distribution Schedule prepared or approved by the Secretary which Depositors will furnish contemporaneously with the execution of this Agreement or shortly thereafter, which Distribution Schedule set forth the amount of distribution to each Beneficiary. The Trustees, in making the initial distribution of voting trust certificates to Beneficiaries, may rely wholly on the instructions as to amounts and distributees contained in the Distribution Schedule, and shall not be liable or responsible to any person on account of the distribution in accordance therewith. The Trust Certificates shall be signed by or on behalf of the Trustees, and shall be substantially in the form hereto annexed, marked Exhibit "A" and made a part hereof.

3. The term "Beneficiary," as used in this agreement, shall mean a holder of record on the books of the Trustees of Trust Certificates issued hereunder, and shall be construed to mean and include not only such holders and owners acting in their own right, but also any person, association or corporation holding Trust Certificates in a representative or fiduciary capacity. In no event shall the term "Beneficiary" include any person who has only a beneficiary interest in Trust Certificates held by others hereunder.

4. The term "voting stock" as used in this agreement shall mean common stock and any other stock carrying voting rights upon the election of directors of the Company, and includes any stock upon the happening of any contingency, and any stock which may be or become convertible into such voting stock.

II. Dividends

III. Powers of Trustees

1. The Trustees, in respect of the stock held by them hereunder, are hereby vested as owners of such stock (without limitation except as herein otherwise expressly provided) with all of the rights, powers, and privileges of every kind and character, of owners thereof, including, without limiting the generality of the foregoing (a) the right to vote the same, as hereinafter provided, for every purpose, (b) the right to become parties to or prosecute or intervene in any suits or other legal or administrative proceedings affecting the stock deposited hereunder, the Company, of the powers, duties or obligations of the Trustees, and (c) the right to transfer all or any part of the Company's stock held hereunder into their names as Trustees or into the name "The Trustees of Menominee Common Stock and Voting Trust."

2. In voting the stock held by the Trustees hereunder, the Trustees shall exercise their best judgment from time to time to vote for suitable directors, to the end that the affairs of the Company shall be properly managed, and in voting on or consenting to other matters which may come before them at any stockholders' meeting or otherwise, the Trustees shall exercise like judgment.

3. The Trustees, individually or otherwise, may hold common stock or other securities of the Company or Trust Certificates issued hereunder, but no Trustee may vote for himself or any other Trustee as a director of the Company. The Trustees individually or any firm of which any of them is a member, or a corporation in which any is a stockholder or officer or in which any Trustee may be otherwise in-

terested, may contract with the Company or be or become pecuniarily interested in any matter or transaction to which the Company may be a party, as fully as though such individual Trustee were not a Trustee hereunder.

4. Except as otherwise herein provided, the affirmative vote of five Trustees entitled to act shall be required to take any action. The Trustees may act by mail vote or at a meeting, or a combination of both. A quorum of four actually present shall be required for a meeting.

5. The Trustees may incur and pay all expenses and disbursements which the Trustees may deem necessary or proper in and about exercising the powers and authority given to or vested in the Trustees by this agreement, and shall be entitled to reimbursement from the Company for any expenses and obligations incurred by them by reason of the Trust, including travel expenses. To the extent such expenses are not so paid or reimbursed, the shares deposited or held hereunder and all other assets and property received or held hereunder are charged with the payment of such expenses. The Trustees shall not be entitled to compensation for their services as Trustees. The obligations and agreements of the Trustees shall not be binding upon the Trustees personally, but shall bind solely the stock and other assets and property in the hands of the Trustees.

6. The Trustees shall keep proper records of their receipts and disbursements and, from time to time prior to termination of the Trust, may issue and mail financial reports to the Beneficiaries and shall issue and mail annual financial reports to the Beneficiaries within thirty (30) days after the final adjournment of each annual meeting of the stockholders of the Company. Such financial reports

shall include information of such nature and scope as the Trustees shall deem relevant and appropriate under the circumstances. Unless legal proceedings questioning the adequacy and accuracy of such financial reports shall be fully instituted within one hundred eighty (180) days after the mailing of any such report, such report as against all parties interested therein shall be conclusively presumed to be in all respects correct. The books and records of the Trustees containing the accounts and the names of Beneficiaries shall at all reasonable times be open to inspection by the Beneficiaries for any proper purpose.

7. The Trustees may appoint a Secretary and an Assistant Secretary (herein referred to as the "Secretary" and "Assistant Secretary"), either of whom may but need not be a Trustee or an officer or employee of the Company. The Trustees may remove and replace at any time the person so appointed as Secretary or Assistant Secretary and may pay reasonable compensation to the Secretary and/or the Assistant Secretary. It shall be the duty of the Secretary to keep the minutes of the meetings of the Trustees and to maintain a record of transactions hereunder, to act as treasurer, and to perform such other duties as herein provided or as may be required by the Trustees. The Assistant Secretary shall act in place of the Secretary in taking any action or performing any duties herein required to be taken or performed by the Secretary whenever the Secretary shall be incapacitated, absent, or for any other reason unable to act. In the event no Secretary or Assistant Secretary shall be appointed or acting hereunder, one or more of the Trustees shall act in place of the Secretary in taking any action or performing any duties herein required to be taken or performed by the Secretary, and in such event all refeernces herein to the Secretary shall be deemed to mean and refer to such Trustee or Trustees.

IV. Sale of the Stock By the Trustees

1. The Trustees may, by affirmative vote of five Trustees, concurred in by Beneficiaries holding Trust Certificates representing in the aggregate at least sixty-six and two-thirds percent (66 2/3%) of all the shares of stock deposited hereunder, direct or make a sale as a unit of all or any part of the shares of stock deposited hereunder for such price and upon such terms or in exchange for such other property as the Trustees shall agree upon: *Provided*, That for a period of thirty (30) years, commencing with the date of this instrument, no such sale shall be made without the prior consent of the State Conservation Commission of Wisconsin and approval by the Governor of Wisconsin.

2. Such sales may be made whether or not any dissenting Trustees or dissenting Beneficiaries shall approve the sale. Dissenting Beneficiaries shall have no rights of appraisal.

3. In the event of a sale of fifty percent (50%) or more of all the shares of stock deposited hereunder, this trust shall terminate. Upon termination the proceeds of said sale together with the unsold shares shall be distributed pro rata among the Beneficiaries holding Trust Certificates. The Trustees shall be authorized to distribute cash in lieu of a fractional share of stock and to decrease the pro rata cash distribution of any shareholder to whom a whole number of shares, in excess of his exact pro rata share, is distributed.

4. If less than fifty percent (50%) of all the shares of stock deposited hereunder are sold, the proceeds of such sale shall be used to redeem outstanding Trust Certificates on a pro rata basis.

V. Transfer of Trust Certificates

* * *

VI. Election of Trustees and Vacancies

1. There shall be seven Trustees hereunder, four of whom shall be enrolled members of the Menominee Indian Tribe of Wisconsin, as defined hereinbefore, or blood descendants of such members, and three of whom shall be persons other than such members or descendants. The term of office of all Trustees other than initial Trustees shall be seven years. There shall be a meeting of Beneficiaries annually immediately preceding the annual meeting of shareholders of the Company, notice of which annual meeting of Beneficiaries shall be given at the same time and in the same fashion as notice of the shareholders' meeting. At such annual meeting of Beneficiaries each year one Trustee shall be elected for a seven-year term by a majority of the votes cast in person or by proxy by the Beneficiaries. To be eligible for election as Trustee, a person must be named in a nomination petition signed by the holders of not less than 2 percent of the outstanding voting trust certificates and presented to the Board of Directors of the Company at least 15 days prior to the date set for the annual meeting of Beneficiaries. The Board of Directors shall prepare a ballot to be circulated along with proxies to all Beneficiaries, containing the names of all persons so nominated, and the Board of Directors shall conduct the election of the Trustee, under such reasonable rules and regulations as they may prescribe. The persons named above as "Trustees" shall be the initial Trustees for terms from one through seven years, and the term of office of each shall be determined at the first meeting of the Trustees by drawing lots, there being one term expiring each year at the time of the annual meeting of Beneficiaries, for the ensuing seven years.

2. Each Trustee shall hold office until he resigns, dies, or becomes incapacitated, or until his term expires as provided above and his successor shall have been duly

elected. Any Trustee may resign at any time by mailing or delivering a written notice of his resignation to each of the remaining Trustees. Vacancies created by resignation, death or incapacitation shall be filled by a new Trustee chosen by a majority vote of the remaining Trustees to serve for the unexpired term.

VII. Amendment and Termination

1. This agreement may be amended from time to time by the affirmative vote of five Trustees in a meeting, the notice of which includes notice of such amendment: *Provided, however,* That if any amendment adopted by the Trustees effects a substantial change in the rights of Beneficiaries, such amendment shall not be effective unless approved in writing (1) by the Beneficiaries holding Trust Certificates representing a majority of the shares of stock then held hereunder, and (2) by the Wisconsin Department of Securities. Notice of all other amendments shall be given promptly after adoption to all Beneficiaries.

2. This agreement shall continue in full force and effect for a period of ten (10) years from the date hereof, and shall then be renewed automatically for a second ten-year period and a third ten-year period, unless at the annual meeting of Beneficiaries next preceding the end of the first or second ten-year period, the Beneficiaries holding Trust Certificates representing in the aggregate at least 50 percent of all the stock then held hereunder shall affirmatively vote to terminate the agreement at the end of such period: *Provided, however,* That if the permissible duration of this agreement shall be limited to any lesser period by operation of law, this agreement shall terminate upon the expiration of such lesser permitted period of duration. In the event this agreement shall be renewed automatically as hereinabove provided, the Trus-

tees then in office shall continue serving for the term for which elected and their successors shall be elected as provided in Part VI, paragraph 1.

3. In the event this agreement shall be terminated as hereinabove provided ten (10) years from the date hereof, the Trustees shall vote the stock hereunder to amend the Articles of Incorporation of the Company to provide for the same restrictions on transfer of stock to the Company as are hereinabove provided restricting the transfer of Trust Certificates, such restrictions to terminate January 1, 1981.

4. Whenever this agreement shall terminate, the rights of all parties hereunder shall terminate and the Trustees shall make delivery or distribution of such stock, assets or other property of the trust, pro rata to the person or persons whose names then appear upon the books of the Trustees as the owners of the respective Trust Certificates and, in making such delivery, the Trustees shall be fully protected notwithstanding they do not require surrender or production of the Trust Certificates.

VIII. NOTICES

1. Whenever a meeting of the Beneficiaries as a class shall be requested in writing by the Trustees or by Beneficiaries who will be entitled to cast at least ten percent (10%) of all the votes which would be entitled to be cast at such meeting, the Secretary shall call such meeting within thirty (30) days and shall promptly give notice to all persons entitled to be present at such meeting, specifying the time and place of holding the meeting (which shall be at a place and time convenient to as many of the Beneficiaries as possible) and the business proposed to be transacted. The Secretary shall likewise give notice of all meetings of the Trustees to each Trustee, specifying the time and place of holding the meeting and the business

proposed to be transacted. Such notices shall be given not less than ten (10) days before the time of holding the meeting, but notice may be waived in writing or by presence at the meeting.

2. Any and all notices herein provided for shall be in writing unless such requirement be waived, and may be personally delivered or shall be given by mailing such notice to the address of the person or corporation to whom such notice is given as shown upon the records of the Trustees and, in the event that notice is given to the Secretary, it shall be given to him at the Office of the Company. In the case of any requirement in this agreement that such notice be for any number of days, such time shall run from the personal delivery thereof or from the mailing of such notice, exclusive of the day of mailing.

IX. VOTING

* * *

X. Miscellaneous

1. The Trustees may construe this agreement, and their construction made in good faith shall be conclusive and binding upon the parties hereto, and the Trustees may make such rules and regulations as in their judgment shall be deemed necessary or proper to carry out the same properly and effectively.

* * *

In witness whereof, the parties have hereunto affixed their signatures and seals as of the day and year first above written.

Depositors Coordinating
and Negotiating Committee of the Menominee Indian Tribe.
George W. Kenote,
Gordon Dickie,
Mitchell A. Dodge.

APPENDIX E

FINAL JUDGMENT
(Record Pages 1642-1644; Formal Parts Omitted)

On the basis of the Wisconsin Supreme Court's Decision of June 29, 1973, and its Decision on the Motion for Rehearing filed August 14, 1973, and upon motion being duly made under Section 274.36, Wisconsin Statutes, by Vance M. Waggoner, one of the Attorneys for the Defendant, N. E. Isaacson & Associates, Inc., and by Gilbert W. Church, one of the Attorneys for the individual Defendants;

IT IS ORDERED, ADJUDGED AND DECREED, That the Menominee Common Stock & Voting Trust is a valid Voting Trust under Section 180.27, Wisconsin Statutes, and under controlling Federal law and the United States Constitution; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That during the term of the Menominee Common Stock & Voting Trust, and any extension thereof, the Voting Trustees have the power and authority to approve the sale of land by Menominee Enterprises, Inc. to non-Menominees, and the approval of the holders of Voting Trust Certificates is neither necessary nor required in order to validate such sales of land to non-Menominees; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the Lis Pendens filed in this action on October 25, 1971, in the Office of the Register of Deeds for Menominee County, Wisconsin, at 3:45 P.M., in Volume 20 of Records, at Pages 240 through 257, as Document No. 6410, be, and the same hereby is, declared null and void; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the Clerk of Courts for Menominee County, Wisconsin, shall certify a copy of this Final Judgment for filing with the Register of Deeds for Menominee County, Wisconsin, all in accordance with the provisions of Sections 281.03(3) and 266.22, Wisconsin Statutes; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the Injunction against further sales of land to non-Menominees, previously entered by this Court against the above-named Defendants, and each of them, be, and the same hereby is, vacated; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the Complaint and Supplemental Complaint of the Plaintiffs herein be, and the same hereby are, dismissed on their merits.

DATED This 7th day of September, 1973.

BY THE COURT:
/s/ *William J. Duffy*
William J. Duffy, Circuit Judge

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

HENRY L. TOMOW, SR., ET AL.,

Plaintiffs,

vs.

MENOMINEE ENTERPRISES, INC., ET AL.,

Defendants.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI OF GEORGE W. KENOTE AND OTHERS

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HENRY L. TOMOW, SR., ET AL.,

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Defendants.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI OF GEORGE W. KENOTE AND OTHERS

I. STATEMENT OF THE CASE

This is a suit brought to block sales of land around an artificial lake. The lake is located in Wisconsin on what used to be the Menominee Indian Reservation. It was developed by a partnership consisting of Menominee Enterprises, Inc. (hereinafter referred to as MEI) and N. E. Isaacson & Associates, Inc. (hereinafter referred to as NEI). Roughly half of the land around the lake had already been sold at the time this suit was begun and is not involved in the suit.

Plaintiffs are a group of Menominee Indians. The Defendant MEI is the Menominee Indian owned corporation formed when federal supervision over the Menominee Indian Tribe was terminated in 1961. It holds most of the tangible assets formerly owned by the tribe. The Defendant, NEI, is a Lake Developer and partner of MEI in the lake project. The individual Defendants (many of whom are represented by this brief) are persons who held leadership positions in MEI or the Menominee Common Stock & Voting Trust. The latter trust holds all of the stock of MEI. Most of the individual Defendants are also Menominee Indians.

The lake development was the outgrowth of a federally financed study that concluded economic development was necessary for the continued viability of MEI and Menominee County and was approved in 1968 by a substantial majority of Menominee people voting in an advisory referendum on the subject. (See the facts set forth in the opinion below, Pet. App. pp. 7-8.) Additional facts will be noted below.

II. ARGUMENT—THE APPEAL SOUGHT WOULD RAISE NO SUBSTANTIAL FEDERAL QUESTIONS

A. The Alleged Failure to Apply the "Rule of Liberal Construction" Raises No Serious Federal Issue.

1. THE RULE OF LIBERAL CONSTRUCTION WHICH THE COURTS BELOW DID NOT FOLLOW WAS NEVER CITED BELOW.

The first reason advanced in the petition for a granting of a writ of certiorari is that the "Wisconsin Supreme Court erred by failing to apply the rule of liberal construction. . . ."

The petition notably fails to conform to rule 23-1(f) of this Court because, although the appeal is from a state court decision, the petition does not disclose where this issue was first raised or the portions of the record showing when this issue was first raised.

This deficiency is undoubtedly attributable to the fact that the Plaintiffs never argued the "rule" before. It was never mentioned to either the Trial Court or the Wisconsin Supreme Court. Only one of the cases cited to this Court in support of the "rule" was cited to the Wisconsin Supreme Court and that for an altogether different proposition.[1]

The Plaintiffs below agreed with the Defendants that the "parol evidence rule" was applicable. The only question there was whether the instruments being interpreted were

---

[1] *Choate* v. *Trapp*, 224 U.S. 665 (1912) was cited on page 19 of the brief of the Plaintiffs to the Wisconsin Supreme Court for the undisputed principle that tribal lands are held by the tribe rather than by individuals.

ambiguous. (See the Wisconsin Supreme Court's opinion at Pet. App. p. 23 and the Trial Court's opinion at Pet. App. p. 47.) Plaintiffs' position before this Court would thus be diametrically opposite to the position they took below on this point on which they are seeking a reversal. Their position here, is therefore, clearly untenable.

2. THE RULE OF LIBERAL CONSTRUCTION IS NOT APPLICABLE IN ANY EVENT.

The "rule of liberal construction" as stated in Plaintiffs' Petition on page 19 is that "In . . . the Government's dealings with the Indians . . . doubtful expressions are to be resolved in favor of the Indians."

This rule is inapplicable first because the dispute here is not between "the Government" and "the Indians." It is essentially a dispute between Indians, some of whom are represented on this brief and vigorously dispute the contentions of the Plaintiffs. No governmental unit is even a party to the litigation.[2]

It should be noted that no treaty or agreement between the Government and the Indians is involved. Although Plaintiffs refer on numerous occasions to the 1854 Treaty of the Wolf River, they do not argue that this case turns on its interpretation. Nor was the Wisconsin Supreme Court asked to interpret that Treaty. The rights Plaintiffs assert here are based rather upon the Articles of In-

---

[2] The State of Wisconsin in the companion case of *Daly, et al.* v. *Natural Resources Board* has been embroiled in litigation by the Plaintiffs but, insofar as this issue is concerned, only because it reasonably relied on MEI's record title to the land. NEI's involvement is also collateral in the sense that it became involved in the development only after it was invited to do so by the Indian leaders.

corporation of MEI, a Wisconsin business corporation, as set forth in the Menominee Termination Plan, described by the Trial Court as "basically the plan of the Menominee Indians." (Pet. App. p. 50.)

The "rule of liberal construction" is also inapplicable because, as the Wisconsin Supreme Court pointed out, the controlling instruments are not ambiguous. The existence of an ambiguity capable of resolution by reference to an established purpose is a touchstone of the rule as expressed in most of the cases, as the following statement of it in *Winters* v. *United States,* 207 U.S. 564, 576-77 (1908) illustrates:

> "By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two [permissible] inferences, one of which would support the purpose of the agreement and the other impair or defeat it."

None of the cases suggest that it is the job of the Courts to completely rewrite all agreements made by Indians.[3]

The rule is inapplicable lastly because the instruments in question here are the work product of a different Indian than the one contemplated by the "rule of liberal construction." The latter, for example, was referred to in *U. S.* v. *Shoshone Tribe,* 304 U.S. 111, 114 (1938) as follows:

---

[3] The Plaintiffs below did not argue that the trust should be "reformed." If they had, their claim would have been barred by estoppel and the Wisconsin Statutes of Limitation since their suit was not commenced until after the lake project was built and 11 years after the terms of the Trust were approved.

> "When the treaty of 1868 was made, the tribe consisted of full blood blanket Indians, unable to read, write, or speak English."

The Menominee of today are a literate people. *Their agreements are entitled to be treated under the law with no less respect than those between white men.* It would be an unjust disservice to them to substitute judicial speculation as to what they intended for unambiguous written instruments which they approved, followed, and relied upon for many years.

3. EVEN IF APPLICABLE, THE RULE OF LIBERAL CONSTRUCTION WOULD COMPEL THE SAME CONCLUSION REACHED BELOW.

The evidence admitted at the trial concerning the purpose of MEI's Articles of Incorporation and the terms of the Menominee Common Stock & Voting Trust does not support the Plaintiffs' construction of those instruments.

The Plaintiffs' reasoning seems to be that: (a) Prior to termination, individual Menominees had individual rights in tribal lands that could not be alienated without their individual assent, (b) the purpose of the Menominee Termination Act was to require that the same "rule" be followed subsequent to termination, and (c) the lake development was improper because the rule was not in fact followed.

This reasoning is so riddled with fallacies as to deserve the label spurious.

(a) Individual Menominees never had any individual rights in Menominee Lands.

No individual Menominee ever held any individual right in Menominee tribal property prior to termination. Tribal

property was owned by the tribe and the tribe, rather than the individuals, had the exclusive right to make the decisions about its alienation.

The Menominee Termination Act was consistent with tribal law in this respect. It specifically provided that the beneficial interests of the Menominees in their tribal property could be alienated only "in accordance with such regulations as may be adopted by the tribe." 25 USC §893, Pet. App. p. 75.

Prior to termination the Menominees acted through their Advisory and General Councils. Relatively few people, in fact, turned out for Council meetings in part because the Menominees were widely scattered. As the Wisconsin Supreme Court noted (Pet. App. p. 3) only 107 people voted on the question of the adoption of the Termination Plan in 1959 out of 3,270 Menominees.

The situation that existed prior to termination is thus no precedent for the Plaintiffs who request that the approval of two-thirds of all Menominees, wherever located, (or their non-Menominee heirs or successors who have beneficial interests in MEI) is a prerequisite to the sale of land to non-Menominees.

(b) The Menominee Termination Act gave the Menominees the right to spell out the rules governing sales of land after termination with a Termination Plan.

The history of the Menominee Termination Act is complex.[4] Suffice it to say here that the Act gave the

[4] Some of the background was covered by the testimony given at the trial. See the appendix to this brief (hereinafter referred to as the "Kenote App.") at pp. App. 1-39. The Wisconsin Supreme Court also reviewed the background of events in general quite extensively. Pet. App. pp. 2-9.

Menominees the right to devise a "Plan" to govern what would be done with their tribal assets after termination and provided that, if the "Plan" were approved by the Secretary of the Interior, the federal government would follow it. Such a plan was adopted, approved, and followed. The documents set forth in this "Plan" rather than historical precedent now obviously govern the method of alienating former tribal lands.

(c) The Termination Plan vested the ultimate power to approve of land sales in the hands of the Voting Trust Trustees during the life of the Voting Trust.

The Articles of Incorporation of MEI and the terms of the Menominee Common Stock & Voting Trust both indicate that the ultimate power to approve of land sales to non-Menominees was in the hands of a Voting Trust.

The Articles of Incorporation provided that such land sales had to be approved first by the MEI Directors and then, under Article XII, by "the holders of not less than two-thirds of the outstanding shares of stock entitled to vote thereon." Because the Voting Trust would hold all of the shares while it was in existence and be entitled to vote those shares, its trustees (and only its trustees) would have the power under Article XII to approve of land sales.

The same power is clear in the terms of the Voting Trust. These terms, of course, were also specifically included in the "Plan" and approved by the Menominees. Suffice it to say here that the Wisconsin Court analyzed those trust terms extensively and accurately (Pet. App. pp. 23-28) and that, since Plaintiffs have not even attempted to find any fault with that analysis, we do not feel it needs to be repeated here.

It is noteworthy that Plaintiffs' petition for writ of certiorari does not discuss the terms of the trust much less attempt to refute the Wisconsin Supreme Court's analysis of them. This is undoubtedly because the trust terms refute all of Plaintiffs' contentions.

The Trial Court made several errors in this case. The most basic one was ignoring the trust's terms when attempting to ascertain the power of the trustees under it. This error was noted by the Wisconsin Court (Pet. App. pp. 24-25) and corrected. Plaintiffs' proposed appeal is intended to persuade this Court to repeat that error. Suffice it to say that the request is unjustified.

The Trial Court also erred in his evaluation of the extrinsic evidence. He ignored, first of all, all of the specific evidence in the point he was deciding: All of this pointed to the fact that the Trustees had the right to approve of land sales. That evidence was:

(i) The parties stipulated that this was the interpretation of the Trust given to the Coordinating & Negotiating Committee by tribal attorneys. (Kenote Appendix p. 6).

(ii) Mr. George Kenote, Chairman of the Coordinating & Negotiating Committee, testified that he intended and understood that the Trustees would have this right. (Kenote Appendix p. 21) No one else testified they had any different understanding.

(iii) Both Mr. Kenote (Kenote App. p. 21) and Mr. Gordon Dickie (Kenote App. p. 7), another member of the Coordinating & Negotiating Committee, testified that they had explained that the Trustees would have this right to many members of the Tribe

and to the many state and federal officials. They also testified that they never gave any contrary interpretations and never heard anyone else give any contrary interpretations until this suit. Their testimony was unrefuted.

(iv) The opinion of the Wisconsin Attorney General circulated at a hearing of the state's Menominee Indian Study Committee held in Madison on April of 1959, at which a number of Menominees were present, stated specifically that the Trustees had the right to approve of land sales to non-Menominees. (Ex. 35, R. p. 1141)

(v) At a hearing held by the Menominee Indian Study Committee in Keshena on April 18, 1959, at which 50 or 60 people were present, the Attorney General asked a Menominee who had attended all of the important meetings and was the wife of the tribal interpreter about her understanding on this point. She answered that she believed the individual Menominees were the "shareholders" but also understood specifically that the Trustees would have the right to exercise the rights of shareholders to approve land sales so long as the Trust was in existence. (Ex. 34, R. p. 1091, Kenote App. pp. 25-26)

(vi) The Trustees' right to approve land sales was specifically confirmed to all Menominees in a June 1, 1959 edition of the *Menominee News*. (Ex. 37, R. p. 1175)

(vii) The power to approve land sales was confirmed by "practical construction" of the Trust by the Trustees. (See Stipulation of Fact Nos. 17-21, R. pp. 271-273)

The Trial Court based his contrary decision exclusively on his readings of the minutes of the Menominee Tribal Councils of 1958 and 1959. But he admitted:

> "I found no discussion in any of the minutes as to whether the trustees would have the right to exercise the authority to sell contained in Article XII during the period that the shares were in trust." (Pet. App. p. 52)

The Trial Court then offered his speculation as to what the Menominees intended. He was guided mainly by an idea that the machinery set forth in Article XII of the Articles of Incorporation would not make sense if the vote of the trustees could authorize the land sales because that would make sales too easy:

> "I am most impressed by the deliberate selection of a very difficult and involved machinery to authorize the sale of land." (Pet. App. p. 54)

What the Trial Court failed to consider was the fact this machinery would make sense and would in fact be utilized *after* the trust terminated and that the termination of the trust was within the contemplation of the parties at the time the Plan was adopted. The latter fact was noted by the Wisconsin Supreme Court. (Pet. App. p. 28)

The Trial Court also ignored the distinction the Plan made between the composition of MEI's Board and the Voting Trust Trustees. A majority of the former were to be non-Menominees whereas a majority of the latter were to be Menominees—and this distinction was not lost on the Menominees. The discourse in the Council meetings upon which the Trial Court relied all related to criticisms of too much power in the hands of the Directors. The Trial Court's assumption that all of this discourse applied equally and automatically to the trustees was unwarranted.

The Wisconsin Supreme Court, of course, did not discuss the "purpose" of the documents as determined from the extrinsic evidence because it found the documents to be unambiguous. The extrinsic evidence is mentioned here simply to show that the assumption underlying the Plaintiffs' claimed reliance on the "rule of liberal construction", i.e. that the "purpose" of those documents as they see it was clearly shown by the extrinsic evidence, is not supported by the record.

B. The Menominee Termination Act Was Not Violated.

The entire section of the Plaintiffs' brief devoted specifically to showing a violation of the Menominee Termination Act is comprised of an argument that technical error was committed in the manner in which the "Certificate of Beneficial Interest" required by 25 USC §893 was written up and then cancelled since the acts of the tribal leaders were not specifically governed by the Plan.

This argument is dealt with correctly by the Wisconsin Supreme Court's Opinion. (Pet. App. p. 22) The principal flaw in it is that the Certificate of Beneficial Interest was required by the statute before the Plan was adopted. Its existence thus hardly supports any argument that the statute was violated. The Certificate was a part of the statutory procedure used to identify the Menominee people in the "final roll" not the disposition of Tribal Assets under the "Plan." The transfers of property were all consistent with the Plan.

It is interesting to note that this argument, if accepted, would void the title of MEI to all lands received by it after termination, not just the title of the lands in suit. Yet Plaintiffs have never attached MEI's title to any lands. Plaintiffs' argument is thus not only totally without merit but inconsistent with their basic posture in the case.

The Wisconsin Court was, we believe, generous to the Plaintiffs in even considering this argument since it was not raised in the pleadings, argued before the Trial Court, or discussed in the Trial Court's opinions. It was an afterthought below—and certainly raises no serious federal issue here.

III. CONCLUSION

We have, we believe, showed that the "federal questions" the Plaintiffs say are present in this case are nonexistent. In closing, we would like to point out that the issues that were raised below were properly decided by reference solely to state law.

The Plaintiffs' principal contention always has been that the unanimous vote of the Voting Trustees in favor of land sales is insufficient because the trust was invalid for want of compliance with *Wis. Stats.* sec. 180.27.[5] That statute requires the signatures of shareholders on Voting Trust instruments. The Plaintiffs complained because all of the individual Menominees did not sign the Voting Trust instrument.

The Wisconsin Supreme Court disposed of this argument by pointing out that, prior to termination, the individual Menominees were not "shareholders" within the meaning of this Wisconsin statute, a question solely one of Wisconsin law.

The additional argument that the Articles and trust should be "interpreted" to support the Plaintiffs' position was also disposed of by the Wisconsin Supreme Court

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[5] It is hard indeed to read any other allegations into the original complaint. Its two counts both seemed dependent on the invalidity of the trust. See the summation of the pleadings by the Wisconsin Supreme Court. (Pet. App. pp. 9, 10)

based on general authorities dealing with state law and earlier Wisconsin cases dealing with the interpretation of trust instruments. (Appendix 23, 25 and 26) Guidance from federal law was neither required nor sought on this point below.

We respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

GILBERT W. CHURCH
Counsel for George W. Kenote and Others, Respondents

APPENDIX

APPENDIX TO BRIEF OF GEORGE W. KENOTE, et al.

ABRIDGEMENT OF TESTIMONY

GORDON DICKIE, called as a witness in behalf of defendants:

Direct Examination by Mr. Church.

My name is Gordon Dickie, Sr. I live in Neopit, Wisconsin. I am a logging contractor. I am an enrolled Menominee. I attended grade school on the reservation. I graduated from the government Indian school in Lawrence, Kansas called Haskal Institute, my high school, in 1930. After graduation I traveled to the West coast and worked at various jobs in the West. I returned to the Menominee Reservation in the fall of 1931. Since then I have lived on the reservation or Menominee County for practically the entire period with the exception of service during World War II.

When I returned to the reservation I worked as a section hand for the railroad and later went to work in the logging operations at various kinds of common labor such as sawing logs, skidding, working in the cook shanty and so on. I am presently a director of MEI.

Prior to termination I represented the Tribe in Washington on a number of delegations. I was elected to the Advisory Council on numerous occasions and was elected and re-elected Chairman of the Menominee Advisory Council on four different occasions. I was first elected to the Advisory Council in 1942. Shortly thereafter I resigned and enlisted in the Navy and didn't return until 1946. I served on the Advisory Council from then until termination with one exception. One term of office I did not serve.

The Menominee people in a general election elected members to the Advisory Council to represent the Menominees. An election was held every two years. The Advisory Council represented the Menominee people in the conduct of their business which included the saw mill operations as well as agencies and social services. The General Council had authority to overrule any objection taken by the Advisory Council. The Secretary of the Interior also had the right to overrule the Advisory Council. The General Council was an assembly of all the adult Tribal members. Notices were posted at least ten days in advance, the order of by-laws was called and every adult member of the Tribe had an opportunity to attend the General Councils. This was the procedure before termination.

> Mr. Church read the stipulation of facts No. 4. In 1953, "Congress by concurrent resolution instructed the Secretary of the Interior to recommend legislation for the withdrawal of federal supervision over the Menominees as well as other named tribes."

The fact of this concurrent resolution was well-known throughout the Menominee Tribe. In the fall of 1953 the Menominees elected a planning committee. I was elected to serve on this committee. The basic purpose of the planning committee as to contact state officials requesting assistance in the problems that would be faced because of the proposed legislation. The planning committee had certain legislative activities. It proposed a plan to be presented to the Tribe in opposition to the proposals by Senator Watkins of Utah. It was felt at the time that the best means of defense was to propose a more equitable plan for the Menominees themselves. Such a plan was developed. This plan was an alternative legislation. It was submitted to

Congress after it had been submitted to the General Council. The response of Congress was to enact proposals promoted by Sen. Watkins. In other words, the planning committee was unsuccessful.

Mr. Church reads stipulated fact No. 5: "In 1954 Congress passed Termination Act Public Law 399."

This was the Watkins Bill that the planning committee opposed. The original proposal by Sen. Watkins called for termination on December 31, 1958.

Mr. Church asks the court to take judicial notice of the law, Exhibit 59, and reads from Sections 6 and 8 as follows:

> "The Secretary is hereby authorized and directed to transfer to the Tribe on December 31, 1958, or on such earlier date as may be agreed upon by the Tribe and the Secretary the title to all property real and personal held in trust by the United States for the Tribe."
>
> "The Tribe is authorized to select and retain the services of qualified management specialists including tax consultants for the purpose of studying industrial programs and some other things. Such reports shall be completed not later than December 31, 1957."

The planning committee continued to function after the Termination Act was passed on December 17, 1954. The first thing the planning committee did after the termination was passed was to contact various state officials including the governor of the State of Wisconsin to ask for assistance in solving the problems created by the

Termination Act. The State of Wisconsin responded to these requests. The Menominee Indian Study Committee was established or created as a special committee. On this committee were the Wisconsin attorney general, various department heads of the state and Menominee Tribal members.

At that time I was a member of the Menominee Indian Study Committee as a representative of the Tribe. The Menominee Indian Study Committee reported to the Legislative Council. The Legislative Council reports to the legislature. The Menominee Indian Study Committee had connections with the University of Wisconsin. A special committee was established to assist the Menominee Indian Study Committee. It was comprised of University of Wisconsin personnel. The Memoninee Indian Study Committee went to the Department of Health, Education and Welfare. It looked into such problems as sanitation care, forestry problems including forestry management, tax problems and various social problems including law and order. The Menominee Indian Study Committee operated by assigning certain departmental officials certain assignments on the basis of which they were to develop necessary reports to be submitted to the committee.

* * *

The Menominee Indian Study Committee furnished the planning committee with preliminary reports in 1956. The Menominee Indian Planning Committee did very little upon the receipt of these reports. This was because the members of the Planning Commission were all employed. They did not have time to develop and coordinate all the reports and, of course, there was the hope that the makeup of the Indian Committee of the United States Congress would change so as to give more favorable treatment to the Menominee people. This took place under the Watkins Bill.

On July 14, 1956, the federal government passed additional legislation. The two major changes of the July 14th act, as shown in Exhibit 60, were that the forests would be operated under sustained yield and that not only reports were going to be required in 1957 but also the plan. By sustained yield was meant that only the fully ripened and matured timber was to be produced from the forest in order to perpetuate the forest.

> Mr. Church read Section 7 of Ex. 60: "The Tribe shall, as soon as possible and in no event later than December 31, 1957, formulate and submit to the Secretary a plan for the future control of the Tribal property."
>
> Mr. Church read further from Section 7: "The plan shall contain provision for protection of the forest on a sustained yield basis."

A sustained yield basis means that you confine your operation to cutting only trees that are fully matured and ripened timber. The younger growth is left remaining so that on a fifteen year cycle you can go back and continue to manufacture. In other words, this would create a forest for industry indefinitely. The bill was passed in July, 1956. By autumn of 1957, the Menominees had made no progress towards development of the Termination Plan that was now required by law. Again, this was because the members were employed full-time and did not have time to put these reports together to develop the plan. As a result we began to get reports out of Washington that they were going to respond unless we quit dragging our feet and proposed a plan. If we didn't they would respond in the form of legislation. In response to this response, in the fall of 1957 the General Council elected a Co-ordinating and Negotiating Committee. This

was a full-time committee. The only person who was not residing on the reservation who was put on the committee at that time was George Kenote.

> Mr. Church read stipulation No. 6: "In November 1957 a General Council of the Tribe created the Co-ordinating and Negotiating Committee herein called the 'Committee'. Its function was to develop a Termination Plan such as was called for by the Termination Act. It acted under authority from the General Council which created it and under the Advisory Council.

The Co-ordinating and Negotiating Committee started to operate in January, 1958. It took the committee approximately one year to develop a plan.

> Mr. Church read stipulation No. 8: "A Termination Plan was proposed to a General Council in a series of three meetings in January of 1959. As amended by those present, the plan was approved by a vote of 91 to 16 on January 17, 1959."

There were changes made to the Termination Plan after it was adopted in January, 1959. I don't recall all the major changes. I remember one was reduction in the number of people to serve on the Board of Trustees. Another change was that a majority of Menominees would serve on the Board of Trustees. These changes were made prior to the adoption of the plan of the General Council on January 17, 1959. There were also changes made after January 17, 1959.

The plan called for certain legislation by the State of Wisconsin. One of the principal legislative items was the Forestry Tax Bill. Another was the governmental organization proposition to create a separate county.

Those are the ones I remember. This legislation was secured in 1959. At that point the Coordinating and Negotiating Committee disbanded and Mr. Kenote left the Reservation.

In the course of the development of this plan, I discussed with many Menominees the right of the trustees to vote shares of stock for land sales under Article XII of the Articles of Incorporation. I told the Menominees that the sale of land could only be authorized by ⅔ vote of the trustees. During the course of the development of this plan by the Coordinating and Negotiating Committee, I never told anyone that the trustees did not have this power. During the course of the development of this plan, I never heard anyone make any statements or contentions that the trustees during the life of the trust could not act for the shareholders in approving land sales under Article XII of the proposed Articles of Incorporation.

The Menominees did very little during the year following July, 1959 when the legislature passed the legislation necessary to complete the Termination Plan. Again, the problem of employment kept individuals from having enough time to spend on implementing the plan. The Congress responded to this inaction by the Menominees by enacting legislation that provided that if the Menominees did not present an acceptable plan, then the Secretary of the Interior was instructed to develop a plan to control and operate the resources, the handling of the funds, the whole operation of the Tribe without any consultation with the Tribe.

Mr. Church referred the court to Ex. 62 which is the amendment to the Menominee Termination * * * Act passed in September, 1960. He read: "If the

Menominee Tribe and the secretary cannot agree upon a plan within the aforementioned six-month period or if they agree upon a plan within such period and the Tribal corporation and voting trust contemplated by the plan are not established prior to March 1, 1961, the secretary shall transfer the Tribal property to a trustee of his choice." He also pointed out that this legislation gave an extension of the termination date from December 31, 1960 to April 30, 1961.

The Tribe responded to this new move by the federal government when a resolution was presented to the General Council requesting the Commissioner of Indian Affairs to assign George Kenote back to the Reservation to work on the Termination Plan.

Mr. Church read the resolution offered in Ex. 46: "Now, therefore, be it resolved, by the Menominee general council meeting in regular session at Keshena, Wisconsin, on July 25, 1960, hereby request that the Secretary of the Interior, or the Commissioner of Indian Affairs take appropriate action to arrange to assign Mr. Kenote to the Menominee Reservation for the time required to assist in working out termination problems in accordance with Tribal and Bureau plans as formulated by the C & N Committee, the Advisory Council, and the General Council of the Tribe."

Cross Examination by Mrs. Downs.

I stated that I understood Article XII in the Articles of Incorporation to mean that the trustees and not the Menominees would vote on the sale of land. I never ex-

pressed to anyone a different viewpoint or heard any other viewpoint expressed in connection with the Board of Trustees.

Mr. Dickie then reads from plaintiffs' Ex. 12, page 11:

> "Mrs. Dick: This Article XII I don't think we should give all the power to the Board of Directors. The power should stay with the shareholders.
>
> Mr. Dickie: Ladies and gentlemen, no matter how small anything is it should be left for the shareholders. Everything should be left for the shareholders to decide, they should have the power. Ladies and gentlemen, I am going to move for the adoption of the substitute Article XII, land operations, as read by Mr. Kenote with one exception."

I am the Mr. Dickie present at that meeting. I imagine I was present at the January 10th meeting of the Menominee Council which is covered in plaintiffs' Ex. 10.

Mr. Dickie reads from plaintiffs' Ex. 10:

> "It states under Article XII, Sale of Land, that it can be done without the consent of the shareholders. Read it. Read your copies. We are going to vote on this question here. Do you want that control—Indian control or white control? They don't have to ask you. That is what it says here. Fellow Menominees, I am in agreement with Mr. Kenote. It is those outside people who are experienced in those fields who I would like to get on the Board of Directors. You got to change the control someplace."

That statement was made by Mr. Monroe Weso.

Mr. Dickie then reads statement of Buddy Weso:

"Mr. Buddy Weso: I would like to have that section revised so that no land could be sold to outside interests. If you give the Board of Directors the right to designate any land as forest land such as 300,000 acres of this reservation as forest land they could sell it without our consent to outside interests."

I don't know if I was actually at the meeting at the time the statement was made. I didn't necessarily sit at the meeting for the entire day. You are in and out. You don't just continually sit there. I don't know if I was there when Mr. Buddy Weso's statement was made. I have no recollection of it. He could have been the fourth speaker after I spoke. Several things were discussed at the meeting on January 17th. One was Article XII and another was Article V which referred to the balance on the Board of Directors.

Mr. Dickie then reads a statement by Mr. Andrews on Exhibit 12, page 20:

"Mr. Andrews: It was stated here and I think it has certainly caused a lot of confusion that by establishing a Board of Directors with non-members of the Tribe, a Tribe would be giving away control of its properties. Now, who actually is going to own this property and coming back to that control. The 3,270 Menominee stockholders are the owners. This is where the control lies. Corporations are owned and controlled by the stockholders. In this case 3,200 Menominees will be the stockholders. Mr. Sammond went into this very thoroughly last Saturday."

[Mr. Church points out that Article XII was not being discussed at this point.]

I am at present on the Board of Directors. I am familiar with the joint venture contract, Lake of the Menominees. I attended the October 15, 1971 Board of Directors meeting. The matter of extending the contract did not specifically come before the Board. First of all, prior to that meeting there were discussions and agreements reached on increasing the number of lots to be sold above the original proposal about 800 more lots. At the October meeting because of advance publicity and other problems the costs of sales were increasing. Those increases were discussed.

The things I just mentioned and the problem of extending the contract are not exactly isolated problems. The increased costs of sales was an isolated problem, but the expanding of the project itself would not be an isolated problem. I might suppose it was negligence on my part as a member of the Board of Directors but with all of this in the picture I just assumed we would carry on to the completion of the project. It just never occurred to me that you had to go through all these special actions to expand the program. I didn't realize you had to do that.

Mrs. Downs reads from Mr. Dickie's deposition:

"Q. But you don't actually remember whether or not there was any discussion whatsoever as to extension—

A. I don't remember specifically, no.

Q. All right. And you also do not remember whether at the time you were aware of the clause in the contract?

A. I don't remember.

Q. When was it called to your mind then?

A. It wasn't until the early part of 1972 that it was brought up.

Q. And where was it brought up?

A. I think there was some discussions on the Board, but I don't recall for sure."

Redirect Examination by Mr. Church.

Referring to the Board of Directors and the number of non-Menominees on the Board of Directors, there was a dispute over whether or not a majority of the Tribal members should serve on the Board of Directors or whether the majority should be non-Tribal members. The Tribe decided on that occasion that the majority of non-Tribal members would serve on the Board of Directors, that occasion being the General Council on January 17, 1959. We were not discussing Article XII of the bylaws.

GEORGE KENOTE, called as a witness on behalf of the defendants, testified as follows:

Direct Examination by Mr. Church.

My name is George W. Kenote. I live in Keshena, Wisconsin. I was born in Neopit, Wisconsin on February 2, 1911. I attended grade school at the Catholic Mission School in Keshena, Wisconsin. I graduated from high school at Shawano High School in 1929. After graduation I tried to get into a couple of colleges on an athletic scholarship. For the most part, I worked in lumber camps and saw mills. I started out as a kitchen helper in one of the logging camps.

I went out logging logs, drove team, sawed logs and ended up as a log scaler and timekeeper. I stopped working for the mills in February, 1934. I was then appointed Chief of Police for the Menominee Reservation. I was employed by the Bureau of Indian Affairs. I worked for

the Bureau of Indian Affairs for 28½ years. I started out in 1934 as Chief of Police for Menominee Reservation. In 1937 I was transferred to Duluth as a special officer for upper Wisconsin, Minnesota and Michigan. I was transferred to the southwest for some time and then back to Rapid City, South Dakota in 1944. I went into service. I came out of service and was back to the Menominee Reservation in 1946. In 1950 I was transferred to Albuquerque, New Mexico as the area special officer in charge of parts of Arizona, New Mexico, Colorado and Utah. In 1966 I was transferred to Washington, D.C. as the assistant in charge. At the time I left the Bureau I was assistant in charge of the Law Enforcement Division, Bureau of Indian Affairs.

> Mr. Church reads stipulation No. 6: "In November, 1957 a General Council of the Tribe created the Coordinating and Negotiating Committee, herein called the 'Committee'. Its function was to develop a Termination Plan such as was called for by the Termination Act. It acted under authority from the General Council which created it and under the Advisory Council."

In November, 1957, I was located in Washington, D.C. I was elected by the General Council to the Menominee Coordinating and Negotiating Committee. I was then elected chairman of that committee by that committee. I actually began to work on January 25, 1958 but I had most of the documents previous to that time for review and study.

Our first job after organization was to gather all of the reports that had been prepared by the Menominee Study Committee by different tribal groups and by the Univer-

sity Study Group that was attached to the Menominee Study Committee. We had to review those reports and try to get some direction out of them. We also had to set up a series of conferences with department heads at Madison —the attorney general's office, the Department of Public Welfare, the Department of Public Instruction, Taxation, Conservation Department, Public Service Commission and Industrial Commission. Why did we meet with these departments? For instance, with the Conservation Department, we wanted to explore at that time the uses and possibilities of the Wisconsin Forest Crop Law and regulation of a forest under sustained yield. We wanted to get the tax impact particularly. We consulted with the Social Service agencies, Education, Welfare and those agencies to get a better picture of what the demands through taxation were going to be on our new community. We wanted to consult with the regulatory agencies for instance on sewer and water, electrical utility and telephone utility. We wanted to know whether they could be owned by Menominee Enterprises. We were also concerned with their organization and about their sustaining themselves by way of financing.

We set up meetings with surrounding County Board members and their officers. We set up meetings with Florence, Marinette, Langlade, Shawano and Oconto counties. There were several committees on different subjects. With Marinette and Oconto counties we wanted to know about their operation of county forests, what the tax implications were there and what the benefits were. We talked with the Marinette County Board for instance on their operation of a county hospital—how it was financed, managed and so forth. We talked with Florence County because it is a county somewhat comparable in value and popula-

tion and problems. We talked to them about their school problems, and tax resources and the county situation under the Forest Crop Law under natural forest laws and so forth.

We also talked with private companies. We set up conferences with Goodman Lumber Company and Calumet Lumber Company and people in related industries. We wanted to explore management techniques and particularly the operation under Wisconsin Forest Crop Law. We had certain proposals in respect to that law that we might have pursued if they were feasible. We generally wanted to know techniques of managing large forests such as our own out from under government control.

We made attempts to keep the Menominee people advised of the activities of the Coordinating and Negotiating Committee's activities. From the outset, we set up a system of weekly written reports to the Menominee Advisory Council. Mr. Dickie who was a member of the Coordinating and Negotiating Committee was also a member of the Advisory Board. He was serving as a liaison officer. During the period in which the Negotiating and Coordinating Committee was operating the Advisory Council usually met monthly but there were also special meetings.

We also set up a system of publishing reports that were called the Menominee News which was mailed to all Tribal members all over the country. The Menominee agency published the Menominee News and that vehicle was available to the Coordinating and Negotiating Committee for our reports. The Menominee News was used as a vehicle for keeping Menominees informed. Through the Menominee News we announced that we would have office hours on Saturdays. We invited people to come and talk with us.

We announced that we would hold meetings at home situations with different groups who would invite us. These were attempts to give the Menominees a chance to explain their wishes to the Coordinating and Negotiating Committee. These meetings in homes were held. We set up a series of meetings with the Menominee Study Committee and different government agencies and kept them informed of what we were doing. Additionally, we set up special meetings by notice and asked the people to come in and talk with us or we would go to Keshena and Neopit and talk with these different groups. Later on, we had meetings preparatory to regular General Councils. I also used personal contacts outside of any formal meeting context.

In 1958, I think I knew just about all the people living on the Reservation who were enrolled Menominees and I am sure the other committee members did too.

> Mr. Church: Mr. Church read from Exhibit 52 which is some minutes of a General Council Meeting held in April of 1959: "Consideration of the form of local government to prevail on the reservation on termination of federal control."

The Coordinating and Negotiating Committee asked that this meeting be held. It was critically important for us to determine the form of local government and the course of direction we wanted to take at an early date as we determined from the conferences we had been holding. This was because, for example, the tax implications were becoming very important. We needed to know the tax implications with respect for instance to the use of the Wisconsin Forest Crop Law or some other form of taxing a forest under sustained yield restrictions. And also we had to balance the tax implications with respect to sufficient income to

support the community. For instance, if we were not permitted to form Menominee County and had to go into Shawano and Oconto Counties under their tax structure, the taxes on the full value of the forest would be prohibitive. We would have had to consider the use of the Wisconsin Forest Crop Law. If we were permitted to form our own county, we had a different situation so that we could accommodate ourselves. One of our principal considerations was to retain the Menominee Forest as a solid economic block for the Menominee people.

Concerning local government, we had three alternatives. One was to remain as we were then geographically situated —seven townships in Shawano County and three in Oconto County. For instances, in Oconto County we would have a considerable piece of value going in Oconto County without any substantial representation. This was partially true in the Shawano County area also. There was some discussion of splitting us up and attaching us to three counties. We wanted to avoid that. There was some discussion of attaching us all to one of the other counties. Under either of these situations, we would have a different tax situation. The remaining alternative, of course, was to form our own county.

At the meeting we reached a general consensus. By resolution the General Council instructed us to pursue the idea of a separate county and ordered the question put to a referendum. These things were done. There were General Council meetings held on the 13th, 14th and 23rd of August, 1957. These meetings were called at the request of the Coordinating and Negotiating Committee. The purpose was to submit to the people certain recommendations that we were prepared to make. We wanted to get their

advice and to discuss them in general so that we could have a course of direction to follow. We did some preparatory work with the Menominee people prior to the scheduled General Council meetings.

Defendants' Exhibit 26 is a public notice that was posted throughout the Reservation advising that the Coordinating and Negotiating Committee would hold meetings with the people at Keshena at 7:00 P.M. on July 28, 1958 to hear and discuss opinions with respect to the land use regulations to be adopted by the Tribe for use after termination. That meeting was held. Defendants' Exhibit 27 is a notice posted by the Coordinating and Negotiating Committee throughout the Reservation giving notice of a meeting to be held at Keshena at 7:00 P.M. on August 7, 1958 for a discussion of regulations on transfer alienation of individual shares; organizing for management and control of public properties; and administration of minors' shares. This meeting was held.

> Mr. Church: Mr. Church read into the record the agenda of the August meetings. On page one the first order of business was consideration of regulations to govern future land use and tenure to be embodied in the Articles of Incorporation.

The Coordinating and Negotiating Committee wrote that agenda. The particular provision concerning land use was a very important matter of discussion among our people. It was important that the Coordinating and Negotiating Committee get some direction from the people with respect to land use. There was quite a wide division among our people as to whether or not they would issue warranty deeds to Tribal members or restrict to leasing only or some

other such form. The issues surrounding this question were, for example, that the people wanted to keep the Reservation intact, particularly the forests, as far as possible. In that respect we wrote those interested that we were considering leasing only. On the other hand, there were many of our people who owned their farm sites, their business sites and home sites and who had considerable investment in them. There was a feeling that Menominee Enterprises might not be successful and down the road somewhere some other management groups might get control of it. The people who had these agricultural businesses and home site investments might then be left out on a limb owning no property. These people were interested in acquiring title.

A consensus on this point was reached at the August meeting. On an informal vote we were told to develop a plan for leasing to Tribal members. The meetings called in August failed to turn up a quorum, that is 75 attending Menominees. Under the circumstances, we would continue to discuss the different matters informally. We would take straw votes, if you will, of the group that was in attendance. These votes were not binding. It was announced that we would come back with final plans at some later date.

The problem of getting a quorum at General Councils has been a historical problem. Knowledge of this problem affected our deliberations as to how the plan should be developed. Knowledge of this problem formed one of the basic reasons for developing the voting trust principle. We wanted to be assured of continuity of management. We wanted to be assured of quorums and the required annual meetings under corporate laws and we wanted to accomplish what we call keeping business affairs out of Tribal politics.

The Coordinating and Negotiating Committee heeded the advice on land use and it was given by the straw vote taken during the August, 1958 open Advisory Council meetings. We instructed our attorneys to draft the Articles to provide for leaving home sites, farm sites and business sites to Tribal members only. With respect to sales, we had had conferences with state people, various government people and commercial corporate people.

It was felt that at some point it was going to be very important that Menominee Enterprises or the Menominee Tribe be able to transfer title to a proposed industrial developer in order to develop industrial improvement and possibly resort or recreational enterprises. With that in mind we instructed the attorneys to draft Article XII with the so-called 2/3 rule as is now drafted. The Menominees were given advance information concerning this Article which was drafted in accordance with our instruction prior to the vote in General Council.

Committee meetings were held beginning December 29, 1958 and running through January 5, 1959 at South Branch Community Hall or Zoar Community Building and at Keshena and Neopit. I was present. We had general, open, round-table discussion of the business management we were proposing. At the last two meetings we had copies of the drafts for distribution. The four communities, South Branch, Zoar, Keshena and Neopit, represent all of the various identifiable communities in Menominee County.

Exhibit 29 is a two-page memorandum dated January 2, 1959. It is a memorandum by the Coordinating and Negotiating Committee which was mailed out to all Tribal members all over the country. Attached to it were documents which were drafts of the Articles of Incorporation,

Bylaws, Voting Trust Agreement, the Minors' Trust and I believe the Bond Indenture. There was also a proposed letter to the Secretary of the Interior. There were some 50 odd pages. These were duplicated and made available at our office and at the council office at the reservation. Some of them were mailed out to people who wrote in and asked for them. Approximately a thousand of these were distributed to Menominees.

During the course of the development of this termination plan I made statements concerning the power of the trustees during the life of the trust to vote the shares in approval of land sales under Article XII of the proposed Articles of Incorporation. I made such statements to various numbers of people—Menominee people, goverenment people and state people. This was a very important subject of discussion. I made such statements before the plan was adopted. I made such statements after the plan was adopted. I told people that during the life of the voting trust the voting trust would hold all of the powers of the members of the Tribe. I told people that this was necessary for stability and continuity of our management. I told people that this assured us the preservation of the forests under the best method. I told people specifically about the right of the trustees of the proposed Articles of Incorporation. I told people that the Articles as drafted left the power to consider the sale of the property to the voting trust during the life of the voting trust. There was no dispute up until termination had occurred about whether the trustees had such power. I never told anyone that the trustees did not have this power.

Meetings were called on January 9th and 10th for the purpose of reviewing the proposed Articles of Incorporation, the Bylaws, the Voting Trust Agreement, Minors'

Trust and the Bond Indenture. At this meeting the Menominees were presented with a resolution to consider the approval of the plan as submitted. A consensus was reached at the meetings of January 9th and 10th. The council preferred to strike the word "part".

We had first proposed that the Board of Trustees would be made up of four non-Menominees and 3 Menominees. This was reversed. The Board of Directors Article as written provided that five non-Menominees would serve with four Menominees. This was reversed. There was also some discussion on Article XII on land. Between January 10th and 17th the change in the Articles with respect to the Board of Directors gave us much concern with regard to our relationship with legislative people in Madison. We knew we had to present to the legislature what they demanded in the way of a viable, workable corporation. They wanted to know who was going to run the business. We had devised our article on the Board of Directors to convince the legislature that we would have adequate and competent people on the Board of Directors, experienced people from the fields of business, finance, law, taxation and so on. When the General Council reversed this, we went to work with the people to convince them that we should leave Article V as formerly written. We also had further discussion with respect to the article on land. Between January 10th and 17th we talked with a lot of people in order to come up with something that would satisfy them and the council.

Mr. Church: Mr. Church reads the first sentence of Exhibit 29, "Unless otherwise authorized by the affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote thereon, the corporation shall have no authority

to sell, exchange, assign or convey or otherwise transfer all or any portion of the real property owned by the corporation other than real property designated by the Board of Directors as forest lands."

Mr. Church then notes that the exhibit goes on to provide that the Board of Directors has the right to lease, mortgage or pledge property on such terms and conditions as it shall deem advisable without the approval of shareholders.

Mr. Church then reads Article XII as it was approved at the January 17th, 1959 meeting or it appears on page 8 of Exhibit 12, "Unless otherwise authorized by the affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote thereon, the corporation shall have no authority to sell, exchange, assign, convey or otherwise transfer all or any portion of the real property owned by the corporation provided, however, that the Board of Directors or the appropriate officers at the direction of the Board of Directors may mortgage or pledge the corporation assets for borrowing purposes it shall deem necessary and advisable in an amount not exceeding $250,000; and provided further that the Board of Directors or the appropriate officers at the direction of the Board of Directors shall have authority to lease real property other than lands designated as forest lands."

Nothing was done at this meeting with respect to changing the basic policy of the corporation to permit the Board to lease only to individual Menominees. Nothing was done at this meeting with respect to changing the basic policy

of the corporation to permit sales in unusual cases with the approval of the shareholders. Nothing was done at this meeting which affected the right of the trustees to vote for sales of land in extraordinary cases. I am now talking about the meeting of January 17th. The termination plan as amended on January 17, 1958 was submitted to the Secretary of the Interior as required by the Termination Act. It was also submitted to the Menominee Indian Study Committee at Madison.

The deadline for the submission of a plan at this time was February 1, 1959. The Coordinating and Negotiating Committee worked with the Congress to gain an extension of time from Dec. 21, 1957 to February 1, 1959. As submitted to the Menominee Indian Study Committee, the plan consisted of three bills which should be acted upon by the state legislature. One to create Menominee County, one to set up a form for taxing the forest under sustained yield and a third to permit the state treasurer to transfer escrowed money to Menominee County when created. It was absolutely important and necessary that we get the Forest Tax Law passed and preferably the Menominee County bill too. In addition to that, the Menominee Study Committee and the Legislative Council Committee advised us that they had to look at the economic plan along with the proposed legislation in order to determine whether Menominee County had a chance to survive post termination based on its business plans.

We had to make an appearance before the Menominee Indian Study Committee with our plans on January 23, 1959. The Menominee Indian Study Committee received the plans for study and review. I had occasion to deal with the Menominee Indian Study Committee staff personnel during the review process. We ran into some objections

to the plan at that time. Two principal objections developed. The most important one had to do with Article XII as adopted by the Tribe on January 17th. As a matter of public policy they objected to what they called a "company county" where one land owner controlled the uses of all the land. They thought as a matter of public policy that the Tribal members ought to have the right to take title to their homesites, business sites, farm sites and so forth. The other objection was they wanted to have more stringent rules pertaining to the sustained yield operation of the forest. Reports were submitted by the staff of the Menominee Indian Study Committee analyzing the Menominee Termination Plan.

At this time John Bowers was in the attorney general's office. He was assigned to the Menominee termination matters. Exhibit 35 which is dated April 20, 1959 was a report made available to the Menominees as of that date at the Menominee Study Committee meetings at Madison. I will read the last sentence on the bottom of page four, "Sale of land is expressly prohibited except pursuant to vote of two-thirds of the stockholders who would be the voting trustees for at least 10 years."

The Menominee Indian Study Committee held meetings convened for April 19, 1959 at Keshena, Wisconsin. Meetings were held on April 20, 21, 22 and 23, 1959 in Madison, Wisconsin.

> Mr. Church: Mr. Church read from Exhibit 34 which is a transcript of the hearings that were held in Keshena on the Reservation by the Menominee Indian Study Committee. The Chairman was Attorney John Reynolds. He was asking questions of a number of Menominees on a number of different subjects. He was testing their understanding of the Menominee termination plan.

"Chairman: Mrs. Weso, one last question. What is your understanding as to the case of the business plan that is proposed by the committee that is adopted? Who would have the say, the control for whether or not the land would be sold or mortgaged? Do you have any understanding of that?

Jennie Weso: Yes, I have.

Chairman: Who would have the say?

Jennie Weso: Two-thirds of the majority vote of the Menominee Tribe. That is my understanding. That is what the Articles of Incorporation say.

Chairman: Do you understand the voting trustees own the stock? Do you understand it wouldn't be the tribe? It would be the voting trustees.

Jennie Weso: I understand that."

There were around 50 to 60 people at that hearing. Mrs. Jennie Weso is the wife of the Mr. Monroe Weso, Jr. who was referred to this morning. The Coordinating and Negotiating Committee responded to the criticism by the Menominee Indian Study Committee that under the plan Menominee County might turn into a company county. After discussion with the attorney general's office some of the human rights people in Madison and some social agencies—we drafted a different article and we asked for the General Council to consider a revision of the article. A General Council meeting was set for April 11, 1959. A quorum did not develop. The Advisory Council then instructed the Coordinating and Negotiating Committee to put the question to a referendum. The referendum was mailed out to all Tribal members all over the country on May 2, 1959. It was returned on May 15, 1959. 448 people favored the revision. 30 people opposed the revision.

This revision loosened up the provisions with respect to sales as they applied to Menominees. Exhibit 32 is the resolution that was put out by the Advisory Council when no quorum developed for a General Council meeting. Exhibit 33 is a memorandum from the Coordinating and Negotiating Committee explaining the proposed change. On the second page, the change was underlined and this is how the Articles of Incorporation looked as they finally ended up after all amendments. No change was made to the language which permitted under the first sentence the sale of land to non-Menominees upon the approval of 2/3 of the outstanding shares of stock entitled to vote thereon. The Menominee Indian Study Committee thought that the referendum revision was sufficient as adopted. When the revision was adopted they then approved the termination plan.

> Mr. Church: Mr. Church presented Exhibit 36 which was a report dated April 30, 1959 of the Menominee Indian Study Committee which basically approves of the Menominee termination plan as amended.

The termination plan was amended one more time by the General Council. The resolution dated July 27, 1959 which is Exhibit 38 is the last substantial amendment to the termination plan. This last revision was related to the state's insistence that the rules on operation of the forest and sustained yield principals be insured. We wanted to support the Sustained Yield Tax Law which set up some of these regulations on operating under sustained yield principles. The legislative people, some of the departmental people and the attorney general's office and the Conservation Department insisted that we also had a covenant to this effect

in the forest land deed: Creation of Menominee County and the adoption of it or enactment of the Sustained Yield Tax Law are contingent on the agreement of the Tribe to a 30-year restriction on sale or incumberment of the forest.

The Advisory Council was composed of the twelve elected members of the Tribe serving on a sort of Executive Committee for the Tribe on a day to day basis. The General Council was made up of a minimum of 75 adult members of the Tribe in an open meeting. The General Council was the basic ruling body for the Tribe and had been since 1872. I knew that advice was given to the Menominees concerning Article XII in writing prior to the final amendment in July of 1959. The Menominee News was sent out to all Menominees no matter where they lived. Of the 3200 enrolled Menominees, we considered at that time about 800 were non residents. I will read from Exhibit 37 which is an issue of the Menominee News of January 1, 1959: "The plan does grant to the corporation's officers the right to lease non-forest lands, but sale of land is prohibited unless two-thirds of the stockholders vote otherwise; and in this case the voting stockholders would be the voting trustees for at least ten years." There is no doubt in my mind that this conclusion was what the drafters of the plan intended.

> Mr. Church: Mr. Church, Mrs. Downs stipulate that Mr. Donald Bosshard who was a lawyer who advised the Coordinating and Negotiating Committee advised that committee that the voting trustees would have the right to approve shares under Article XII so long as the trust was in existence.

The legislation necessary for this plan was assured of passage in the middle of July, 1959. I think it was on July 17th that the legislation went through the Senate. I was assured it would go through the Assembly. I then returned to Washington.

When back in Washington, I kept myself advised about Menominee problems. I received copies of all correspondence between the attorneys, the people in Madison, the Tribal officers and the Bureau of Indian Affairs people. I kept in contact as well with the legal counsel in Washington, the Wilkinson firm. I attended conferences while in Washington on Menominee problems. We had conferences with the Bureau of Indian Affairs on roads. We had conferences with the Bureau of Indian Affairs and the Department of Health, Education and Welfare, on educational improvements and construction of new facilities to accommodate public school problems. We had conferences on furthering the sewer and water improvements in the Villages of Keshena and Neopit.

In October, the Secretary of the Interior's office assigned me to set in on what was known as the final review of the Menominee termination plan by the attorneys and the Secretary's office representing the State of Wisconsin and the Tribe. These were held in October, 1959. I prepared a memorandum summarizing Menominee problems in April, 1960. It is Exhibit 44. At this time there was considerable discussion and criticism in the Department of the Interior, the Bureau of Indian Affairs and up on Capitol Hill about the lack of progress being made in the implementation of the Menominee termination plan. There seemed to be a lot of foot dragging. To overcome that criticism, I wrote this report. I tried to indicate to the department people and the Congressional people that there was a bigger problem than they realized and that they were putting an unconscionable burden on the Menominee people.

I went back to the Reservation prior to termination on August 8, 1960. The Menominee General Council had asked the Secretary of the Interior that I be assigned to the

Reservation. When I got back I went to Madison and spent several days there conferring and consulting with the attorney general's office, the Conservation Department and various social agencies, the Industrial Commission and the Public Service Commission in order to try to bring myself up to date on the status of affairs. I also had discussions with the representative of Foley & Lardner, a law firm which was still associated with us in trying to find a starting point for attacking the problems that were outlined in the April, 1960 report. Under the amended Termination Act, there was language that the Menominee Tribe had to have its business corporation and its voting trust structure organized by March 1, 1961 or the Secretary of the Interior was again instructed to develop a trust management plan of his own and transfer the Menominee properties over to a trustee of his choice for management or disposition.

In working against that deadline, it was important that we find substantial people who would serve as trustees and directors for Menominee Enterprises. I engaged myself in that to a large extent. I also worked with the Advisory and General Councils and the Menominee Tribe on perfecting these programs and getting the elections and so forth completed. We did something about sewer and water problems. I worked with the Department of Health, Education and Welfare and with Tribal people on perfecting sewer and water improvements and public school construction and road completion. I had a lot to do with putting the forest management plan into final form.

I worked as a Bureau of Indian Affairs employee on these various problems until termination. After termination I retired from my position with the Bureau of Indian Affairs. This was not a regular retirement. It was a short-term retirement, a reduced-term retirement.

After I retired I stayed on with Menominee Enterprises at that particular time as assistant to the president. My duties were to work with the Tribal land problems, that is deeding out or leasing out homesites and business sites to Tribal people who wanted them. I served as the personnel officer. We negotiated the labor contract. I was also the liaison officer with the regulatory agencies in Madison on utility regulations. We set up the forest taxation procedures, the utility regulations and that sort of thing. We had problems to work on at that time. We had to set up procedures for workmen's compensation, coverages under the Industrial Commission and safety measures had to be worked out in our saw mill plant. There were innumerable regulatory agencies that had to be dealt with. I stopped working as an employee of Menominee Enterprises in 1968 at my doctor's insistence.

During the course of the Menominee termination plans, development projections were made as to the economic viability of Menominee County and Menominee Enterprises. These projections did not turn out to be accurate.

The projections failed to materialize because of two major problems. First, during developmental days of the program, we relied heavily on estimates made by the University Study Group in regard to funds needed for community support. When we set up a budget to fund Menominee County, we found a need for approximately $400,000 annually; we actually needed almost $600,000. Secondly, the projections on financial viability were based on a forest management plan developed by the Federal Government between 1957 and 1960. These plans indicated that instead of cutting a maximum of around two million feet of timber a year, we would cut up to 30 million and sometimes

as high as 35 million in order to put the forest in what they call condition class. When we began to operate under Menominee Enterprises we adopted the federally developed forest management plan and began to gear up to a 30 million a year harvest. By 1965 we had reached this level of production.

In the operating year of 1966 actual experience showed that the forest management plan was not dependable. We couldn't get the harvest out of the forests that we had expected. We had to cut our operating plans back to between 20 and 22 million feet of timber. The estimates that we had were low. We found then that the forest produced about 25% or more less than we had expected. The increased level of expenditures on the part of local government was an important factor for Menominee Enterprises because at the outset Menominee Enterprises had to pay 93% of the total tax burden for the support of all activities.

Our annual production in forest yield is currently down around 14 million. This is roughly 50% of the amount that was projected. An error of this magnitude occurred because the forest management plan was developed on what they call photointerpretation. With some ground checking, they were able to determine the species that were established on the ground and to determine the volume. Now this is the point at which the plan proved independable. When we actually got out to start logging we found that you couldn't get the yield that the plan said you would get.

Today without the lake development there is no possible way that Menominee Enterprises, Inc. could pay the amount of taxes that are needed to be paid.

In response to these problems the Menominees in 1960 immediately petitioned Congress to provide some financial aid in lieu of taxation. These aids were granted through 1964, I believe. We received 438,000 dollars for sewer and water improvement. We received 660,000 dollars to relieve the education tax burden. After 1966 we again petitioned Congress when we found that the forests were not yielding what they were supposed to yield. We then got what is called the Nelson-Laird aids which gave us another 450,000 dollars for sewer and water improvement. We received a total of about $1,400,000 in tax relief aids for education, health and welfare situations. These things expired on June 30, 1970. After we got the Nelson-Laird aids we were told by members of the Congress that this would be the last aid and that we had better go home and do something for ourselves.

At the time of termination there was consideration of industrial and commercial development.

> Mr. Church: Mr. Church read from page 3 of plaintiffs' Exhibit 3. "The Menominee Tribe now operates a conventional sawmill. This is done pursuant to the act of March 23, 1908, 35 Stats. 51, an act which constituted an early model for sustained yield forestry practices. The Menominee Indian Mills have not advanced perceptibly into specialized branches of the highly competitive lumber industry. In order to survive and to improve its present economic situation, such expansion is deemed essential."
>
> Mr. Church then read from the bottom of the page. "In addition the Tribe and its successor corporation have available some of the most natural, commercial, recreational possibilities in the United States. De-

velopment of these resources is being considered and such study will continue. Assistant Secretary Ernst has volunteered to make available the knowledge and advice of the National Parks Service and the Bureau of Fish and Wildlife in this effort. What will develop along this line is uncertain, but this is one field which will have high priority on the part of Tribal leaders and the executives and Board of Directors of Menominee Enterprises, Inc."

I was involved in some attempts to develop industrial development after termination. As assistant to the president, I was instructed to consult with the Department of Resource Development at Madison which was engaged in encouraging and locating industry all over Wisconsin. Through that office, I was given leads into the Chicago and Milwaukee areas. We were looking for something like a light metal fabricating company that would like to relocate in our area. A toy company that could use wood products once considered coming. We were looking for the recreational people, the resort people. We were following up numerous contacts and we had consultations with these types of groups but we just couldn't get the industrial development people to come in.

The main difficulty was the uncertainty of the tax structure. We didn't know where it would level out. Another difficulty was that it was always apparent that there was a freight in and freight out problem. Freighting in raw materials and freighting out finished goods was a problem. We also had the question of having a well-trained and experienced work force available.

There was interest in recreational development. Prior to termination, the Department of the Interior assigned some of their people to the Reservation to make an agricultural analysis. Their report was that the recreational potential made such projects feasible. They did not go into any detail. As a course of action they recommended that after termination we immediately consult with a firm known as Nellon Engineers in Summerset, Pennsylvania which is more or less a land expert in the recreational development field. We also consulted with a company known as the U.S. Lands which is located in Columbus, Ohio. We had consultations with firms here in Wisconsin too on recreational potential and development. All of these studies dealt with the same area, that is the area now involved in the Legend Lake project. Certain common conclusions were reached. It was commonly concluded that the Legend Lake area was not a timber producing area. It was submarginal land. At its best it would be usable for recreational development.

In 1966 when the Congress granted the tax relief aids and advised us that we should not come back for any more federal aid, the Wisconsin delegation arranged for the Department of Commerce to do a resource study of Menominee County. This work was accomplished by the firm of Ernst & Ernst in 1966. In March, 1967 they delivered a report to us. When we received the report we distributed it among the Board of Directors and the voting trust. We also sent copies to the Menominee Indian Study Committee and there was general circulation to people who were interested in this field.

Mr. Church: Mr. Church referred to stipulation of facts No. 12 which provided that on August 10, 1967 the Board of Directors and Trustees jointly passed

a resolution which approved of the economic development zones of Menominee County within the guidelines specified by the Ernst & Ernst report.

The Ernst & Ernst report recommended lake development at the location of the present Legend Lake project.

* * *

The economic development zone resolution was approved by unanimous vote of both the Trustees and the Board of Directors. The Trustees and the Board of Directors also requested that a referendum be held on the subject among all enrolled Menominees. The referendum was held on September 23, 1967.

Efforts were made to communicate the facts concerning the economic development plan to individual Menominees prior to the actual vote. On August 17, 1959 we mailed out to all the Menominee people throughout the country copies of what we called the Status Report Menominee Indians 1967 with the resolution of August 10, 1967 attached. We also set up meetings in Neopit and Keshena, Milwaukee and Chicago to discuss the report and recommendations with Tribal members. I was present during those meetings. The vote of the adult members was about 18 to 11 in favor of the economic development concept. The vote approved the issuance of warranty deeds and land transactions. This ratio does not consider the vote of the First Wisconsin or other minors' votes. After the September referendum Menominee Enterprises on its own action based on previous engineering studies that had been made started to clear the land and excavate for the creation of the west end of what is now Legend Lake. By the early part of 1968 we realized that we needed more expert help in the fields of engineering, hydrology, and other areas of expertise in

which we were not prepared. Promotion and financing were not sufficiently available to us to do a good job. When this was realized we consulted with other developmental companies and finally invited Isaacson & Associates to join with us in the Legend Lake effort. We had made a review of his earlier projects.

Mr. Church: Mr. Church read stipulation of facts No. 14. "On July 9, 1968, MEI and N. E. Isaacson and Associates, Inc., herein called Isaacson, entered into a joint agreement calling themselves Lake of the Menominees. They planned to develop and sell to persons including non-Menominees certain lands situated in that part of the economic zone approved for development." Mr. Church also referred to Exhibit 53 which is a resolution unanimously taken on July 15th and 18th, 1968 specifically defining the Legend Lake development area.

I am familiar with Exhibit 53 and its attachments. The lands described as involved in the project cover all of what is today the Legend Lake project. The lake property paid in 1971 about 36% of Menominee County taxes. If this project goes through to completion the lake residents will pay about 65% of Menominee County taxes. Menominee Enterprises, Inc. put in the land which I have described as submarginal as a contribution to this partnership. At the time the land was put into the partnership its assessed value was $50.00 an acre.

Mrs. Downs: Mrs. Downs noted her objection to this line of questioning.

The present assessed valuation of the land is around $10,000 to $12,000 an acre. The initial contributions to the partnership on our part was around 1,300 acres. This composed less than 1% of the entire county. As a result of this project, Menominee Enterprises, Inc. has to date realized a little over $1,800,000. Upon completion the projected profits are another $2,000,000. This project is absolutely necessary to the survival of Menominee Enterprises.

Cross-examination by Mrs. Downs.

In our notice to the Menominee people concerning the referendum of 1967 we announced that the referendum would be an advisory vote on their part and that the responsibilities lay with the trustees for the adoption of the resolution. We further advised that the implementation would lie with the Board of Directors. The fact that the referendum was advisory was printed right in the notice that went out regarding the meeting.

I see that defendants' Exhibit 57 is a copy of the Menominee News dated June 1, 1959. During direct examination I read an item on page 16 in which Mr. Bower stated that the voting stockholders would be the voting trustees as to land sales for the first ten years.

Plaintiffs' Exhibit 12 is a copy of the Menominee General Council minutes for January 17, 1959. That was the day that the Menominee termination plan was adopted by the General Council. It doesn't appear from page 2 that either Mr. Bower or Mr. Fisher is listed as present at that meeting. I don't think they were present.

Question by Mr. Church: Do you have a list from your own recollection as to when and where General Council meetings occurred?

Kenote: Yes, I do.

The Court asked whether the witness had records to substantiate the meetings.

Kenote: I maintain a personal file through all these years. I don't have it with me. I do have access to the minutes of the General Council but I don't have them all with me. There were other meetings besides those that were discussed at this trial.

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No. 73-760

In the Supreme Court of the United States

OCTOBER TERM, 1973

HENRY L. TOMOW, SR., ET AL.,

Petitioners,

vs.

MENOMINEE ENTERPRISES, INC., ET AL.,

Respondents,

and

N. E. ISAACSON & ASSOCIATES, INC.,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

In their responses to the petition for certiorari, the respondents have basically asserted that the petition fails to conform to Rule 23-1(f) of the Rules of this Court, and that this case does not raise federal issues conferring jurisdiction upon this Court.

A. THE PETITION FOR CERTIORARI MEETS THE REQUIREMENTS OF RULE 23-1(f).

The legal questions presented by the petition rest entirely upon the petitioners' specially claimed rights under

a federal treaty,[1] federal statutes,[2] a federal-Indian document, the Menominee Termination Plan,[3] and the equal protection and due process clauses of the 5th and 14th Amendments to the Federal Constitution. The "History of Litigation" portion of the Statement of the Case, at pages 8-10 of the petition, clearly satisfies the requirements of Rule 23-1(f) in that it sets forth the federal nature of petitioners' initial claims in the pleadings, the respondents' admissions that 25 U.S.C. §896 and the Menominee Termination Plan apply to the case; and the fact that the State Court rulings on which petitioners seek review were based upon interpretation of 25 U.S.C. §§893 and 896, the language of the Termination Plan, and the federal constitution.

The petition at page 9 states, with citations to the appropriate opinions, that the Trial Court noted petitioners claim that "Indian lands were wrongfully taken;" that it considered the case as one involving this special context; that in view of the language of the Termination Plan relating to land sales, a review of all the circumstances surrounding the adoption of the Plan was necessary in order "to find out what the true intent of the Menominees was with respect to the sale of land,"[4] and that the tribe's intent in approving the language of Article XII was to reserve to its members the right to approve sales of tribal lands to non-Menominees. In other words, the Trial Court

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[1] The 1854 Treaty of Wolf River, Record pp. 285-286.

[2] 25 U.S.C. §§893 and 896, Record pp. 1417-1419.

[3] Plan for the Future Control of Menominee Indian Tribal Property and Future Service Functions, 26 Fed. Register, pp. 3726-3755 (April 29, 1961), Record pp. 295-324.

[4] See Trial Courts opinion, Pet. App. p. 49.

recognized petitioners' claims that a review of the circumstances surrounding the adoption of the Termination Plan by the tribe was in order, and it accordingly applied the liberal rule of construction in its consideration of the land sales issue. The petition further notes at page 9 that "the Wisconsin Supreme Court rejected the broad standard of review which was adopted by the trial court in finding that 'the language of the voting trust agreement, which was a part of the Termination Plan' granted the voting trustees the power to approve sales of tribal lands to non-Menominees." Lastly, the petition states on pages 9 and 10, with citations to the opinions, that both the Trial Court and the Wisconsin Supreme Court found that the establishment of the voting trust did not violate the requirements of 25 U.S.C. §893, and that the Wisconsin Supreme Court also held that petitioners' 5th and 14th amendment rights to due process and equal protection of the laws were not violated. Hence petitioners assert that, although the complex nature of the case and the holdings of the two state courts are greatly abbreviated, the petition conforms to the requirements of Rule 23-1(f).

B. THIS CASE RAISES SUBSTANTIAL FEDERAL QUESTIONS WHICH WERE CLEARLY RAISED AND PASSED UPON BY THE STATE COURTS BELOW.

By attempting to characterize the instant case as an "internal dispute" among Indians whose legal issues have been resolved by the construction of "corporate documents" by recourse only to State law, respondents have callously and deliberately ignored several critical factors: (a) the factual setting which initially gave rise to petitioners' claims; (b) the method in which the case was tried; and (c) the fact that in deciding the instant case,

both the Trial Court and the Wisconsin Supreme Court necessarily and clearly interpreted federal law, a federal Indian document, the Menominee Termination plan,[5] and the due process and equal protection clauses of the 5th and 14th Amendments to the Federal constitution.

1. The Land Sales Issue.

In addition to petitioners' claims in their pleadings and briefs to the Trial Court, the federal nature of the case was succinctly presented to that Court by the individual respondents' attorney, Mr. Church, in his opening remarks:

> **This was not something the Menominees decided for themselves. It was something they had to do pursuant to *federal* law. It is not only a decision of the Menominees as we point out in our brief. It involves a *bilateral contract between the Menominee Tribe and the federal government.* This was an *extension of the 1854 Wolf River Treaty.* This also involves the *nature of a federal regulation.*[6] (emphasis supplied)**

Thus, at the outset of the case, it was clear to the parties and the Trial Court that the issues presented by the petitioners' claims required the interpretation of federal Indian laws and documents.

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[5] In 25 U.S.C. §896, Pet. App. p. 75-76, Congress mandated that the Menominee Tribe formulate a "Termination" Plan, and that the Secretary of the Interior approve the Plan if it met various criteria and conformed to state and federal law, and he was also to publish it in the Federal Register. The Termination Act did not become fully effective until the Secretary published the Termination Plan. See message of Secretary accompanying publication of Plan, 26 Fed. Reg. p. 3726 (April 29, 1961) and the Court of Claims and this Court's comments in Menominee Tribe of Indians, 179 Ct. Cl. 496, 509 (1967), Aff'd 391 U.S. 404, 411 (1968).

[6] See Trial Transcript, Record page 1455.

The petitioners argued before the Trial Court that in resolving the Article XII ambiguity problem posed by the pleadings, it was necessary to look to the circumstances surrounding the Tribe's approval of the Termination Plan. The Trial Court noted the unique context and nature of the petitioners' and respondents' claims,[7] as well as the language of the voting trust agreement and MEI Articles of Incorporation and concluded that:

> "this is not an ordinary trust agreement but one that requires a consideration of the background and an interpretation of the plan against the proper setting."[8]

Accordingly, the Trial Court attempted to "find out what the true intent of the Menominees was with respect to the sale of land,[9] and thus, applied the liberal rule of construction in interpreting the language of the Termination Plan.

On appeal, the Wisconsin Supreme Court adopted a narrow view of the petitioners' claims, despite the fact that the Trial Court had previously used the broad standard of review. The State Supreme Court virtually ignored the Article XII interpretation question, which was the issue below,[10] and restated the land sales issue as:

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[7] See petition at pp. 9, 14-16, and Trial Court opinion, Pet. App., pp. 49-50, and comments, supra.

[8] See petition at p. 15, and Trial Court opinion Pet. App., pp. 49-50.

[9] See Trial Court opinion, Pet. App., p. 49.

[10] That Court lamely stated as to Article XII:

> While it is true that the language contained in Art. XII *may* have no effect while the trust is still in existence and while the shares are being voted as a unit by the trustees, *it will have a clear and unambiguous meaning after* the trust no longer exists; an eventuality which was within the contemplation of all

(Footnote continued)

> "whether the *voting trust agreement* clearly grants authority to the trustees to sell land to non-Menominees."[11] (emphasis supplied)

In construing a few general provisions of the trust agreement in a vacuum, despite the fact that that agreement incorporates the rest of the Termination Plan numerous times by reference,[12] the Wisconsin Supreme Court's analysis led it to the illogical conclusion that the Menominee tribal members in approving Article XII agreed that the 7 voting trustees, 3 of whom were non-Menominee, would have the power to sell their tribal lands to non-Menominee for a period of 10-30 years. After the termination of the trust, the tribal members would be able to approve such sales; if there was anything left to sell, that is. This conclusion is so abhorrent to the Menominee, and indeed, all Indians view of the land, as to be patently ridiculous. The Menominee Tribe did not agree to this interpretation of Article XII, nor did the Secretary when he approved the

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of the parties at the time the plan was adopted. Decision, Pet. App. pp. 27-29. (emphasis supplied)

Contrary to the respondents' contentions, it is petitioners' position that this statement constitutes an admission that the critical language of Article XII is ambiguous rather than a holding that it is unambiguous. It should also be noted that the "inoperativeness" of Article XII while the voting trust is in existence, which is implied in the statement, is wholly unsupported by the remainder of the decision. This implied holding is clearly inadequate to constitute justification for the Wisconsin Supreme Court's refusal to consider the specific language of Article XII relating to land sales and the intent of the Tribe when it approved the Plan.

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[11] See Wis. Supreme Court decision, Pet. App. p. 25.

[12] See Termination Plan, 26 Fed. Reg. pp. 3726, 3735 (Ap. 29, 1961), Record p. 304.

Plan. The Congressional intent behind 25 U.S.C. §896 was that the Menominee were to decide this question. The language of *Winters* v. *U.S.*, concerning the manner in which ambiguities or double-meanings in federal Indian documents must be interpreted,[13] is more pertinent than ever to the issues raised in this case. Contrary to petitioners' assertions,[14] petitioners strongly object to the narrow manner in which the Wisconsin Supreme Court approached the land sales issue, with its reliance on general words to the exclusion of specific language relating to land sales, and assert that that Court's decision must be overturned in order that the Menominees and all Indians may safely rely on their treaty and statutory rights to their land.[15]

2. The Validity of the Voting Trust Issue.

Contrary to the respondents' contentions, the Trial Court held that petitioners' rights under 25 U.S.C. §893

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[13] See petition, p. 20 and individual respondents' brief, p. 5. Also see Brief of Association on American Indian Affairs, Inc. as Amicus Curiae in Support of the Petition, p. 8, wherein numerous citations to the record are listed which indicate that the members of the Menominee Tribe had little or no understanding of the meaning and effect of various aspects of the Termination Plan.

[14] See individual respondents' brief, p. 9.

[15] As for respondents' contention that the application of the liberal rule of construction, and, thus, a consideration of tribal intent, would result in affirmation of the Wisconsin Supreme Court's decision, petitioners assert that the Trial Court, which did consider tribal intent, decided that the persuasiveness of the defendants' evidence, which consisted primarily of post-tribal-approval writings and oral recollections by two of the individual defendants of events which had occurred 12 years previously, was "far less than the writing" relied upon by petitioners (Pet. App. p. 54).

had not been denied,[16] and it noted that petitioners had also argued that their due process rights under the 5th and 14th amendments to the federal constitution had been denied by the method in which their beneficial interests which constituted personal property by virtue of §896, 25 U.S.C., had been alienated to the voting trust without individual tribal member approval.[17]

The Wisconsin Supreme Court stated the voting trust issue as whether the trial court had erred in holding that the "voting trust was not invalid because it was contrary to controlling federal and state law and the United States Constitution."[18] That Court discussed at length[19] the petitioners' procedural and constitutional arguments based on §893, including the fact that the Secretary had approved the Termination Plan. It, then, clearly held that the procedural requirements of §893 had been met, and that petitioners' 5th and 14th amendment constitutional rights based on the provisions of §893 had not been denied.[20]

As this Court stated in *Raley* v. *Ohio*, 360 U.S. 423, 436-7 (1959):

> There can be no question as to the proper presentation of a federal claim when the highest state court passes on it. . . . We think this sufficient here to satisfy the statutory requirement that the federal right sought to be vindicated in this Court be one claimed below. 28 U.S.C. §1257(3).[21]

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[16] See Trial Court opinion, Pet. App., pp. 45-46.

[17] See Trial Court opinion, Pet. App., p. 46.

[18] See Wis. Supreme Court's decision, Pet. App. p. 14.

[19] See Wis. Supreme Court's decision, Pet. App., pp. 18-23.

[20] See Wis. Supreme Court's decision, Pet. App., pp. 22-23.

[21] See also *Ward* v. *Village of Monroeville*, 409 U.S. 57, 61 (1972), *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295, 299 (1971), and *Whyy* v. *Grassboro*, 393 U.S. 117, 119 (1968).

Petitioners also dispute the individual respondents' claims as to the merits on this issue,[22] and assert that it is clearly necessary, and well within this Court's jurisdiction, for this Court to review the decision of the Wisconsin Supreme Court.

CONCLUSION

Rule 19-1(a) of this Court governing the considerations for granting certiorari is clearly satisfied in the instant case. The Wisconsin Supreme Court has decided several federal questions of substance not heretofore determined by this Court and, in addition, has decided them in a way not in accord with applicable decisions of this Court. The protection of Indian lands has consistently been of concern to Congress and this Court, and restrictions such as those adopted by the Tribe in Article XII have been vigorously enforced.[23] The alienation of the beneficial interests in the tribal assets, without adherence to the protective provisions of 25 U.S.C. §893, has resulted in the sale of precious tribal lands without the approval of tribal members. Petitioners once again[24] request this Court to uphold their rights under the Termination Act and Plan and the federal constitution.

Respectfully submitted,

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[22] See petition, pp. 22-24, for petitioners' arguments on this issue.

[23] See Brief of National Congress of American Indians, National Tribal Chairmen's Assn., Univ. of New Mexico American Indian Law Center, as Amici Curiae in Support of the Petition.

[24] See *Menominee Tribe of Indians* v. *U.S.*, 391 U.S. 404 (1968).